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In The
Supreme Court of the United States

BRUCE BABBITT, JOHN LESHY, EDWARD COHEN, EDITH R. BLACKWELL, PHILLIP A. BROOKS, SABRINA A. McCARTHY, MICHAEL ROSSETTI, ANNE SHIELDS, TOM C. CLARK, II, CHARLES W. FINDLAY, AND JOHN S. MOST,

Petitioners,

v.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court's denial of personal knowledge of disputed evidentiary facts, notwithstanding its acknowledged and extensive *ex parte* communications, forecloses a finding that the court's impartiality "might reasonably be questioned" under 28 U.S.C. § 455(a).

PARTIES TO THE PROCEEDING

The Petitioners in the proceedings before the United States Court of Appeals for the District of Columbia Circuit were Petitioners Phillip Brooks, Tom C. Clark II, Charles W. Findlay, John S. Most, Sabrina McCarthy, Anne Shields, Bruce Babbitt, John Leshy, Edward Cohen, Edith Blackwell and Michael Rossetti.

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OPINIONS BELOW

The Court of Appeals' opinion is reported at 383 F.3d 1036 and is reprinted in the appendix hereto at pages App. 1 through App. 20. The District Court's opinion is reported at 237 F. Supp. 2d 71 and is reprinted in the appendix hereto at pages App. 59 through App. 129.

BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was filed on September 14, 2004. A motion for rehearing was not sought. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTORY PROVISIONS INVOLVED

Section 455(a) of Title 28 of the United States Code provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Section 455(b)(1) of Title 28 of the United States Code provides: "He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Canon 3A(4) of the Code of Conduct for United States Judges provides: "A judge should . . . except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding."

STATEMENT OF THE CASE

I. Overview

Petitioners are eleven current and former government servants from the Department of Interior and the Department of Justice. Along with at least twenty-eight other

current and former government officials, they have been named in motions for orders to show cause why they should not be held in civil and criminal contempt in *Cobell v. Norton*, Civil Action No. 96-1285 (D.D.C.).[1] This Petition raises the question of whether the District Court Judge's participation in over 120 hours of *ex parte* communications with a Special Master and Court Monitor, who themselves conducted an even greater number of hours of *ex parte* communications with parties and witnesses, gives rise to an appearance of impropriety under 28 U.S.C. § 455(a) that mandates the court's recusal from the contempt proceedings. *Cobell* is a lawsuit on behalf of a class of Native Americans to obtain equitable relief arising from the federal government's management and accounting of monies held and distributed under Individual Indian Trust accounts. None of the Petitioners has ever been a party to the *Cobell* case in his or her individual capacity, and only one, former Secretary of the Interior Bruce Babbitt, was ever a party to the lawsuit in his official capacity. Plaintiffs substituted current Secretary of the Interior, Gale Norton, as a defendant for Secretary Babbitt, after she was sworn in on January 30, 2001.

Before Petitioners were named in the contempt motions at issue here, the District Court appointed two agents to assist in the underlying litigation: (1) a Court Monitor, later referred to as Special Master-Monitor ("Monitor" or "Court Monitor"), charged with reviewing the government's trust reform progress and reporting the results in writing to the court; and, (2) a Special Master ("Special Master" or "Master"), appointed pursuant to FED.

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[1] The Hon. Bruce Babbitt is the former Secretary of the Department of Interior. John Leshy is the former Solicitor and Edward Cohen is the former Deputy Solicitor of the Department. Sabrina McCarthy is a former Assistant Solicitor of the Department. Edith Blackwell is the Deputy Associate Solicitor, Michael Rossetti is the former counselor to Secretary Gale A. Norton, and Anne Shields is the former Chief of Staff to former Secretary Bruce Babbitt. Phillip Brooks, Thomas Clark, John Most and Charles Findlay are Department of Justice attorneys who formerly represented the Government in the *Cobell* litigation.

R. CIV. P. 53 to oversee discovery in the *Cobell* case. Throughout their tenure as court appointed agents, and with the approval and encouragement of the District Court, both the Monitor and Master engaged in hundreds of hours of *ex parte* interviews and contacts with parties and witnesses. Each of these court agents then engaged in extensive *ex parte* meetings with the District Court and, in preparation for many of these meetings, prepared written memoranda and briefing papers for the court. None of the Petitioners ever consented to any *ex parte* meetings.

In October 2001 and March 2002, Plaintiffs filed motions for orders to show cause for contempt naming Petitioners and twenty-eight other former and current government employees. On September 17, 2002, the District Court referred the motions to the Master to develop a factual record and make recommendations to the court. *See Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002). In the interim, invoices and time records submitted by the Master and Monitor disclosed an astounding pattern of *ex parte* communications between the court agents and witnesses and, in turn, between the agents and the court. The District Court also acknowledged in its September 17, 2002 order that it met *ex parte* with these agents.

Concluding that these contacts compelled recusal of the court and its court agents from consideration of the contempt motions, on October 29, 2002, the Petitioners filed a motion in the District Court seeking recusal of the District Judge, the Master, and the Monitor from the contempt proceedings. With respect to the judge, Petitioners argued that his private meetings with the Master and Monitor, who in turn had engaged in a pattern of private meetings with witnesses and parties, gave rise to an appearance of impropriety under section 455(a). Petitioners also argued that the judge had gained personal knowledge of disputed evidentiary facts under section 455(b)(1).

On January 17, 2003, the District Court denied the Petitioners' motion and refused to disqualify the Master, the Monitor or himself. With respect to the decision not to recuse himself, the District Judge simply asserted that

while his numerous hours of private meetings with the Master and Monitor may have concerned the subject matter of their *ex parte* meetings with third parties, he knew of no facts that he learned during those meetings. *See generally, Cobell v. Norton*, 237 F. Supp. 2d 71 (D.D.C. 2003), App. 59-129. In February 2003, Petitioners filed petitions for writs of mandamus seeking relief in the D.C. Circuit Court of Appeals. While their petitions were pending, the Court of Appeals ruled on a separate appeal by the Government in the *Cobell* case to recuse the Court Monitor and ordered him recused on July 18, 2003. Also in the interim, and immediately after the oral argument on Petitioners' requests for writs of mandamus, the Court of Appeals stayed the District Judge's referral of the contempt motions to the Special Master, and enjoined him from taking any action. Order dated Mar. 15, 2004. Before the Court of Appeals issued its decision, the Special Master resigned.

On September 14, 2004, the Court of Appeals decided Petitioners' requests for writs of mandamus, holding, with respect to the Master, who had already resigned, that the Master's *ex parte* contacts had given him personal knowledge of disputed evidentiary facts relevant to the contempt proceedings, and that those proceedings should never have been referred to him. With respect to the District Judge, however, the Court of Appeals held that because he had denied receiving *ex parte* communications substantively related to the contempt proceedings from either the Master or the Monitor, there was no reason to conclude that he had abused his discretion by refusing to recuse himself. *In re Brooks,* 383 F.3d 1036 (D.C. Cir. 2004), App. 1-20.

Thus, in its two decisions regarding recusal in *Cobell*, the Court of Appeals found that *ex parte* communications necessitated recusal of the Monitor and Master. Yet, on the same facts, the Court of Appeals failed to recuse the District Judge, basing its ruling entirely on the assertion by the District Judge that he did not receive extrajudicial information.

II. Previous Proceedings

The Plaintiffs filed this suit in 1996. In 1998, the District Court divided the litigation into two phases. The first phase involved "reforming the management and accounting of the IIM trust" and the second phase involved "performing a historical accounting of the IIM trust accounts." In February 1999, the District Court appointed Mr. Balaran to serve as Special Master pursuant to FED. R. CIV. P. 53. *Cobell v. Babbitt,* 37 F. Supp. 2d 6 (D.D.C. 1999); Order dated Feb. 24, 1999. The Special Master was appointed to "oversee the discovery process and administer document production, compliance with court orders, and related matters . . ." *See Cobell*, 37 F. Supp. 2d at 39. He was also ordered to review the Defendants' plan to bring themselves into compliance with previous orders of the court, and to submit monthly reports and recommendations assessing the adequacy of steps being taken to meet that goal. Order dated Feb. 24, 1999, at 2-3. While Mr. Balaran's order of appointment did not authorize him to engage in *ex parte* communications, his time records reflected numerous hours of *ex parte* meetings with parties and witnesses. None of the Petitioners consented to these *ex parte* communications.

On April 16, 2001, the District Court appointed Mr. Kieffer to serve as Court Monitor to monitor trust reform activities and file reports of his findings with the Court. *See Cobell v. Norton*, No. 96-1285, 2001 U.S. Dist. LEXIS 12591, *2-3 (D.D.C. Apr. 16, 2001). The parties to *Cobell* consented to the order granting him authority to "make and receive *ex parte* communications." *Id.* at *4. The court's order dictated that the Government "provide Mr. Kieffer with access to any Interior offices or employees to gather information necessary or proper to fulfill his duties." *Id.*[2] As with Mr. Balaran's appointment, however,

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[2] The court subsequently terminated Mr. Kieffer's appointment as Court Monitor and appointed him as Special Master-Monitor. *See Cobell v. Norton,* 226 F. Supp. 2d 1, 159 n. 168, 163 (D.D.C. 2002) (holding Interior Department defendants in contempt of court); *See also Cobell v.*

(Continued on following page)

none of the Petitioners consented to Kieffer's appointment. Moreover, none ever agreed that Kieffer would be permitted to conduct *ex parte* meetings or to communicate the substance of those meetings to the Court.

In July 2001, the Monitor filed his first report with the Court. *Cobell v. Norton,* No. CIV. A. 96-1285, 2001 WL 777076 (D.D.C. Jul. 11, 2001). It contains extensive hearsay and draws many inferences and conclusions from the Monitor's numerous, unrecorded *ex parte* communications with witnesses. The Monitor subsequently filed seven additional reports, similarly based upon his extensive secret meetings with witnesses. Moreover, the Monitor's time records reflect numerous *ex parte* meetings with often-unidentified witnesses. They also include charges for hours of meetings with the court regarding unspecified matters. The first of Plaintiffs' contempt motions against Petitoners, filed August 2001, was based largely on the Court Monitor's first report and the opinions he formed from his *ex parte* contacts. *See Cobell,* 2001 WL 777076. Plaintiffs' second contempt motion, filed in October 2001, repeated the allegations in the first motion and raised additional allegations based on the second, third and fourth Court Monitor Reports. In April 2002, the District Court extended Kieffer's one-year term, over objection of the Defendants. *See* Order dated Apr. 15, 2002, at 2.

On June 14, 2002, the Government moved to revoke the Monitor's appointment on grounds that the Monitor's actions exceeded Constitutional and statutory authority and intruded into Executive Branch functions. *See* Interior Motion, June 14, 2002 at 10. The motion further argued that the Monitor's actions, in meetings with witnesses, demonstrated a personal bias and lack of impartiality that required his disqualification under §§ 455(a) and 455(b)(1). *See id.* at 18-23.

Norton, No. 96-1285, 2002 U. S. Dist LEXIS 17354 (D.D.C. Sept. 17, 2002) (appointing Joseph S. Kieffer, III as Special Master-Monitor), *vacated by* 334 F.3d 1128 (D.C. Cir. 2003).

On September 17, 2002, the District Court denied the Government's motion to revoke the Monitor's appointment and, instead, appointed him to the elevated position of Special-Master Monitor. *Cobell v. Norton*, 226 F. Supp. 2d 163 (D.D.C. 2002), App. 130-52; *see also Cobell v. Norton*, No. 96-1285, 2002 U.S. Dist. LEXIS 17354 (D.D.C. Sept. 17, 2002). Simultaneously, the District Court referred the show cause motions against Petitioners to Special Master Alan Balaran. *See Cobell v. Norton*, 226 F. Supp. 2d 1, 155-56, 158-59 (D.D.C. 2002). The referral ordered Mr. Balaran to develop a complete record regarding Petitioners and to issue a report and recommendation regarding whether they should be ordered to show cause why they should not be held in contempt. *Id.* at 155. Finally, the District Court issued an order holding the Secretary and Assistant Secretary of Interior in contempt. *Id.* at 161. The contempt findings against the Secretary and Assistant Secretary, which would eventually be overturned by the Court of Appeals, involve some of the same allegations as those contained in the motions now pending against the Petitioners.

III. Evidence of *Ex Parte* Communications

The District Court's written opinions and the invoices for compensation submitted by the Monitor and Master clearly indicate that the District Judge participated in numerous hours of *ex parte* meetings with his appointed judicial officers, who in turn engaged in extensive *ex parte* communications with witnesses and parties concerning the very facts at issue in the contempt motions. For example:

- The Special Master's time records indicate that he engaged in almost 200 meetings with third parties and potential witnesses *ex parte* for approximately 435 hours. Petition for Writ of Mandamus (Bruce Babbitt, Edward Cohen, John Leshy, Edith Blackwell, and Michael Rosetti) [03-5048], Feb. 24, 2003, at 22.
- The Special Master also conducted meetings with Plaintiffs or Plaintiffs' counsel, apparently without the

presence of defense counsel, on approximately seven occasions for a total of approximately six hours. *Id.*

- The Special Master's time records indicate he conducted secret *ex parte* meetings with persons he referred to as "moles," as well as unnamed DOI employees. *See, e.g.,* Special Master's Invoices for Services Rendered April 18, 2001, April 20, 2001, and May 21, 2001, App. 175, 183.
- The Special Master held at least seven *ex parte* meetings with the Court for approximately eight hours. Motion for Recusal (Bruce Babbitt, John Leshy, Edward Cohen, and Edith Blackwell) [1583-1], Oct. 29, 2002, at 14.
- The Monitor's time records indicate that, between April 2001 and the end of August 2002, he had at least 240 meetings with "third party" witnesses. Motion for Recusal, at 7.
- The Monitor met with the court on over 80 different occasions for which he billed over 120 hours of time. Petition for Writ of Mandamus, at 12.
- In November 2001 alone, immediately following the filing of Plaintiffs' October 19, 2001 contempt motion, the Monitor billed 22.75 hours for time spent preparing for and meeting with the court. *Id.*
- During the four-month time frame encompassing the contempt trial, November 2001 to February 2002, the Court Monitor met with the court on 30 separate occasions and billed a total of 58 hours for preparation and meetings. *Id.*
- On August 6 and December 11, 2001, the Monitor billed for time spent preparing a "talking paper" and "notes" for meetings with the court. *Id.*
- The District Court also acknowledged it met with the Monitor "on a number of occasions." *Id.* at 11.

The District Court's written opinions furnish additional evidence that it received extrajudicial factual information from the Monitor and that it used its personal knowledge of disputed factual matters to adjudicate matters before it. For example, in its opinion denying DOI's motion to revoke the Monitor's appointment, the

trial court excoriated the officials who had submitted declarations relating to the Monitor's conduct in private meetings, acknowledging that "the Court is personally aware of the background of the April 19, 2002 meeting [between the Deputy Secretary and Court Monitor], the conversations at that meeting and at the subsequent meetings between the Deputy Secretary and the Court Monitor." *Cobell,* 226 F. Supp. 2d at 170, App. 141.

Subsequently, in its September 30, 2002 order denying the Government's motions for adjustments to the Monitor's fees, the court again rejected the Government's complaints about the Monitor's *ex parte* communications, acknowledging that the Court Monitor had always kept the court informed of the "nature, extent and substance" of his meetings with third parties. *Cobell v. Norton*, 223 F. Supp. 2d 156, 160 (D.D.C. 2002), App. 161.

IV. Prior Proceedings Regarding Disqualification

On October 29, 2002, Petitioners moved to recuse the District Court Judge, the Special Master, and the Court Monitor from participating in the contempt proceedings pursuant to 28 U.S.C. §§ 455(a) and (b)(1). Their motions were based on the District Court's own admission that it had acquired extra-judicial knowledge about the "nature, extent and substance" of the Monitor's *ex parte* fact-finding, as well as on the Master and Monitor's time records and invoices, which, as noted above, documented hundreds of hours of *ex parte* communications with witnesses, parties and moles, as well as scores of lengthy private meetings between the Master, Monitor and the court. *See, e.g.,* Motion for Recusal, Babbitt, et al., at 10-11.

On January 17, 2003, the District Court denied Petitioners' motions for recusal and vigorously defended the Master and Monitor, holding that

> the Master and Monitor have conducted their activities and acquitted their responsibilities well within applicable legal and ethical bounds. They have neither received nor used ex parte communications in a manner that would undermine the

> ability of the Master to investigate the underlying allegations in an unbiased manner or the ability of the Court to render a fair adjudication.

Cobell v. Norton, 237 F. Supp. 2d 71, 78 (D.D.C. 2003), App. 77. Far from disputing that the Master and Monitor had engaged in *ex parte* fact-finding, or that they had kept the court abreast of their efforts, the District Court expressly endorsed their practices: "The Court has expressly permitted the Special Master to engage in ex parte communications in the course of his various assignments, and there is nothing in the September 17 Referrals that proscribes such contacts in the course of his investigation of the matters referred to him." *Id.* at 83, App. 88-89.

The court also acknowledged that its own contacts with these judicial officers provided it with information: "[T]hroughout these regular consultations, the Court discussed with the Master the general nature of the ongoing [investigative] tasks that the Master was involved with . . ." *Id.* at 90, App. 102. The court acknowledged not only that it was conceivable that the Master may have conveyed facts in his discussions with the court, but also that, "if the Master had conveyed information he had obtained in an investigatory capacity to the Court," there would be grounds for recusal. *Id.* at 90, App. 102. Nevertheless, the court denied the motions for recusal and asserted that the communications were merely administrative in nature, stating:

> The Monitor's time records show that he has consulted with this Court on a number of occasions during the course of this litigation. During these consultations, the Monitor informed the Court about his activities, in order that the Court could ensure that the Monitor was earning his keep. In the course of a typical meeting, for example, the Monitor might inform the Court that he planned to travel to New Mexico to meet with the Office of the Special Trustee, and receive a briefing about their role in the historical accounting process. Or he might explain that he traveled to Billings,

> Montana to meet with title records office personnel, examine their hard copy records, and review the pilot TAAMS system.

Id. at 91-92, App. 105-06. The court insisted that it had received no extrajudicial knowledge of disputed facts in the litigation and that there was no basis for recusal under § 455(b)(1). *Id.* at 98-99, App. 120-21. Furthermore, the court concluded that no reasonable observer, with knowledge of all the relevant facts, would conclude that the judge's impartiality should be questioned, and that recusal was therefore not required under § 455(a)'s objective standard. *Id.* at 98-100, App. 121-22.

In February 2003, Petitioners filed requests for writs of mandamus with the Court of Appeals for the District of Columbia seeking recusal of the District Judge, the Monitor and the Master in the contempt proceedings. The grounds for these petitions were: (1) that a reasonable person would question the District Court's impartiality under § 455(a) because the court had engaged in extensive unrecorded conversations with the Court Monitor and the Special Master, who themselves engaged in *ex parte* conversations with parties and witnesses; (2) the District Judge had obtained personal knowledge of evidentiary facts and should also be recused under § 455(b)(1); and (3) the Master and Monitor should be recused from further proceedings involving Petitioners because the Master and Monitor had met privately with parties and witnesses who had knowledge of matters at issue in the contempt motions. Petition for Writ of Mandamus at 3-4.

On July 18, 2003, prior to ruling on Petitioners' request for mandamus, the Court of Appeals ruled on the Government's appeal of the District Court's September 17, 2002 Orders and vacated the appointment of the Monitor. *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), App. 21-58. In its decision, the Court of Appeals held that "Kieffer's experience as Court Monitor disqualified him from later assuming a judicial role in [the] case." *Id.* at 1144-45, App. 47. The Court of Appeals also overturned five contempt specifications against the Secretary and Assistant Secretary of Interior – part of the same contempt allegations

that form the basis of the motions directed against Petitioners. *Id.* at 1147-50, App. 52-58.[3]

With regard to the Monitor's appointment, the court held that "the District Court does not have inherent power to appoint a monitor – at least not a monitor with the extensive duties the court assigned to Kieffer – over a party's substantial objection. . . ." *Id.* at 1141, App. 40. Characterizing the Monitor's role as that of "an internal investigator, not unlike a departmental Inspector General," *id.*, App. 41, the court noted that the "Monitor's portfolio was truly extraordinary . . . he became something like a party himself . . . charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Id.*, App. 42. According to the Court of Appeals, the court had acted beyond the scope of Rule 53 and violated the requirement that a special master under Rule 53 not be an "advocate" for the plaintiffs or a "roving federal district court." *Id.* at 1142-43, App. 43.

The Court of Appeals confirmed that the ethical restrictions of 28 U.S.C. § 455 apply to special masters, and concluded that "Kieffer's prior role and personal involvement in this case as Court Monitor would cause a reasonable person to doubt his ability to remain impartial while serving as Special Master." *Id.* at 1143-44, App. 45. The court noted that, through his extrajudicial access to internal deliberations of the Department regarding the lawsuit, Kieffer acquired information that allowed him to develop opinions about the proper behavior of defendants in the case. *Id.* at 1144, App. 46. "These facts," the court stated, "so clearly cast a shadow over Kieffer's impartiality

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[3] In overturning the contempt findings, the Court of Appeals held that: (1) the Secretary and Assistant Secretary could not be held criminally liable for contempt based on the actions of their predecessors; (2) the Assistant Secretary could not be held in contempt where there had been no identification of any specific act or omission on his part; (3) the Secretary's quarterly status reports did not rise to the level of fraud on the Court; and (4) the facts did not support a finding that the Secretary had acted with intent to deceive or defraud the Court. *See generally, Cobell v. Norton*, 334 F.3d at 1147-50, App. 52-58.

that the district court abused its discretion in appointing Kieffer to be Special Master (in addition to Monitor)." *Id.*, App. 46.

V. The Opinion on Review with this Court

On September 14, 2004, the Court of Appeals ruled on Petitioners' February 2003 Petitions for Writ of Mandamus. *In re Brooks,* 383 F.3d 1036 (D.C. Cir. 2004), App. 1-20. While some of the Petitioners originally sought recusal of the District Court Judge, the Special Master and the Special Master-Monitor, by the time the court held oral argument on Petitioners' request for a writ, the Special Master had resigned and the Court of Appeals had already removed the Monitor. *Id.* at 1038, App. 2. Therefore, the issues remaining before the court in the Petitioners' request for a Writ of Mandamus were: (1) whether to suppress the reports and records written (but not filed) by the Master before he resigned; and (2) whether to recuse the District Court Judge. In its ruling, the Court of Appeals vacated the Master's reports and recommendations related to the contempt proceedings, but refused to recuse the Judge. *Id.* at 1038, 1046, App. 2, 19-20.

A. The Court Vacates the Special Master's Reports and Recommendations Because of The Special Master's Reliance on *Ex Parte* Communications

The Court of Appeals granted Petitioners' request to permanently enjoin the release of the Master's reports, recommendations, and other work product. Finding that the Master was a "judicial officer" within the meaning of section 455, the Court of Appeals rebuked the District Court, which had condoned and even encouraged Balaran's reliance on *ex parte* communications, and noted that Balaran's four-year involvement in trust reform litigation involved "innumerable contacts" with witnesses and third parties who had information relevant to the contempt proceedings, and that, "[i]nevitably, [Balaran] would have formed impressions about the character of some, perhaps

many, of the individuals named in the contempt proceedings." *Id.* at 1045, App. 16.

Reviewing a January 21, 2001 letter from the Master to Petitioner, Phillip Brooks, the Court of Appeals found,

> [I]t seems likely, if not inevitable, that Balaran's compilation of the record for the district court's review, not to mention his reports and his recommendations, would be subject to selection bias; at the very least, an observer apprised of all the facts would reasonably question his impartiality. Indeed, if Balaran could properly serve as special master advising the district court whether to initiate contempt proceedings, then it would seem equally permissible for a judge presiding over a criminal proceeding to dispatch his law clerk to visit the scene of the crime, take fingerprints, interview witnesses, and report back to the judge about his findings. The judge's undertaking to review the clerk's findings *de novo* would not be assurance against the biases of the clerk affecting the judgment of the court; so much worse if the clerk, like Special Master Balaran, had personal knowledge of the parties – and perhaps of the events in suit – from prior dealings with them.

Id. at 1045-46, App. 18.

The concern, the court noted, "is with information that 'leaves no trace in the record' . . . such as Balaran's *ex parte* contacts with 'moles' and unnamed DOI employees – that may reasonably be expected to color the way in which he approaches his task, and ultimately his reports and recommendations to the district court . . ." *Id.*, App. 19 (citing *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996)). Thus, the Court of Appeals held:

> Because the district court's proposed *de novo* review of Balaran's findings does not render his task as special master in the contempt proceedings non-adjudicative, the *ex parte* communications Balaran had in his role as special master in the trust reform litigation required his recusal

> from the contempt proceeding pursuant to § 455(b)(1). Moreover, the nature and extent of his *ex parte* contacts would lead an informed observer reasonably to question his impartiality, thereby requiring his recusal independently pursuant to § 455(a).

Id., App. 19. As a result, the court then enjoined the release of Balaran's reports and recommendations. *Id.*, App. 20.

B. The Court Refuses to Recuse the District Court Judge

Thus, the Court of Appeals not only vacated the District Court's appointment of the Monitor to the position of Special Master-Monitor, *Cobell v. Norton,* 334 F.3d 1128 (D.C. Cir. 2003), App. 21-58, but also ruled that the District Court erred when it failed to recuse the Master. The Court of Appeals also enjoined release of the Master's reports and recommendations. *In re Brooks,* 383 F.3d 1036 (D.C. Cir. 2004), App. 1-20. The Court of Appeals based these decisions on the grounds that a reasonable person would question the impartiality of each officer.

In seeming contradiction, the Court of Appeals refused to recuse the District Court Judge. *In re Brooks,* 383 F.3d at 1038, 1046, App. 2, 19-20. In so doing, the Court of Appeals failed to examine the same record it had scrutinized in its decisions regarding the Monitor and Master, and instead based its denial entirely on the fact that the District Judge "has stated he did not receive *ex parte* communications substantively related to those proceedings from either Balaran or Kieffer, and we have no reason to conclude he abused his discretion by refusing to recuse himself." *Id.* at 1038, App. 2.

First, in upholding the denial of recusal under § 455(b)(1), the Court of Appeals noted that the District Judge acknowledged meeting privately with the Monitor and the Master "but rejected any suggestion those meetings constitute a proper ground for his recusal. "Far from it, the district court stated: 'It is not only appropriate but

necessary for the Court, as principal, to consult with its agents regarding the manner in which they are carrying out their assigned duties . . .'" *Id.* at 1041, App. 8. The Court of Appeals also rejected Petitioners' concerns regarding the District Judge's acknowledgement that the Monitor had made the court aware of the "substance" of his conversations with witnesses and third parties. It was sufficient, the Court of Appeals stated, that the District Judge had addressed these concerns in the Petitioners' motions to recuse and had concluded, "'Any honest reading of these opinions . . . demonstrates that movants have fundamentally misconstrued' the relevant passages." *Id.* at 1042, App. 10. The Court of Appeals concluded that the District Judge had reasonably explained his statements, and that, given his explanations, these statements and the surrounding facts did "not show that the district judge acquired personal knowledge of disputed evidentiary facts." *Id.*, App. 11.

Similarly, in addressing whether the District Judge should be relied upon to recall what was discussed in these numerous private meetings, the Court of Appeals relied exclusively upon the word of the District Judge. The Court stated:

> He need not recall all that was discussed at those meetings; he need only recall that the substance of the special masters' findings was not discussed. If, as he represents, that was an implicit ground rule for the conduct of those meetings, then the pertinent question is whether it was ever violated. We see no reason for not accepting the judge's unequivocal response.

Id. at 1043, App. 12. Thus, relying exclusively and entirely upon the District Judge's assertions, the Court of Appeals found that there was no basis for recusal of the District Judge under § 455(b)(1).

Finally, the Court of Appeals rejected Petitioners' claim that the District Judge should be recused under § 455(a) because his impartiality in the contempt proceedings might be questioned. *Id.*, App. 13. Surprisingly, the court offered no separate analysis of whether recusal was

required under the objective standard of section 455(a), concluding instead that the District Court's denial of having received extrajudicial information wholly disposed of any claim that the District Court's impartiality might reasonably be questioned. According to the Court of Appeals, on the question of whether a reasonable and informed observer would question the judge's impartiality, "the answer is no, for the same reason we determined above that the judge's *ex parte* contacts with the special masters did not give him personal knowledge of disputed evidentiary facts." *Id.*, App. 13. By offering no separate explanation for its decision to reject recusal of the District Court under the objective standard of section 455(a), the court made clear that it was persuaded by the same reasoning that guided its decision under section 455(b)(1): the "unequivocal" denial by the district judge that he received any "bare facts" or "substance" in his off the record meetings with the Monitor and Master.

REASONS FOR GRANTING THE PETITION

In enacting 28 U.S.C. § 455(a) in 1974, Congress sought to replace a subjective scheme, in which a judge considering disqualification was the sole arbiter of the propriety of his own conduct, with an objective test, which asked, instead, whether or not a reasonable and informed observer would question a judge's impartiality. By focusing on the *appearance of impartiality*, rather than a judge's estimation of the propriety of his conduct, Congress sought to inspire public confidence in the integrity of the judicial system. With its decision below, the Court of Appeals has taken a giant step backward. Although the Court of Appeals paid lip service to the objective test required by section 455(a), it concluded that the standard was satisfied by the District Judge's denial that he had received substantive *ex parte* information. By concluding the inquiry precisely where it should have begun, the Court of Appeals has essentially undone Congress' painstaking efforts to fashion an objective standard for disqualification and, in its place, substituted the very scheme Congress expressly

rejected. The Court of Appeals' complete reliance on the District Judge's own estimation of the propriety of his conduct is not merely incorrect, it is at odds with the decisions of the Courts of Appeals of the Third, Fifth, and Seventh Circuits, which, in similar circumstances, have correctly recognized that the inquiry called for by section 455(a) cannot be resolved by deferring to a district court's own memory and characterization of off the record meetings and conversations.

As modern day litigation becomes more complex, district courts are turning with frequency to Special Masters, expert advisors, and other forms of outside assistance. As they do, *ex parte* communications with these third party assistants are more and more frequently used by district judges – sometimes, as in this case, in ways that fundamentally deprive litigants of their rights to an impartial tribunal. This case presents the Court with an opportunity to map the limits of permissible *ex parte* communications in these circumstances – an issue that the D.C. Circuit not only got wrong, but also resolved in a way that flatly conflicts with the rulings of other circuits.[4]

ARGUMENT

1. Prior to 1974, Congress furnished two bases to recuse a federal judge: (1) 28 U.S.C. § 144 (1970), which required recusal for bias or prejudice; and (2) 28 U.S.C. § 455 (1970), which required a federal judge to disqualify himself in circumstances where his connections to a party, witness, counsel, or the underlying facts rendered it improper "in his opinion" to sit. Before it was amended, 28 U.S.C. § 455 provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or

[4] This Petition for a Writ of Certiorari, under 28 U.S.C. § 1254(1), should also be considered a Petition for Mandamus, under 28 U.S.C. § 1651, if the Court grants Certiorari and also wishes to grant full relief.

> has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1970) (amended 1974).

While two of the factors for disqualification under the old Section 455 were clear – when the judge was either of counsel or a material witness – the other two were less so. They hinged on the terms "substantial" and "so related to or connected with . . . as to render it improper in his opinion." Congress was concerned about the subjective nature of this inquiry. "It will be perceived as a practical matter that in these two instances the statute leaves the matter of disqualification to the 'subjective' opinion of the judge, or as some cases state it 'to the conscience of a particular judge.'" *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on the Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, United States Senate*, 93d Cong. 2 (1973) (statement of Sen. Quentin N. Burdick, Chairman, Subcomm.). In Congress' opinion, the problem was further exacerbated by the so-called "duty to sit" rule, which provided that a judge, "faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.'" H.R. REP. NO. 93-1453 (1974) at 5, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355.

Also troubling to Congress was the fact that "although judges [were] prohibited from sitting in cases where they have been of counsel, or witness, or where they are related to a party or counsel, the statute fail[ed] to remind the judges of their obligation to 'avoid the appearance of impropriety' as required by the American Bar Association's Canon's of Judicial Ethics." *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on the Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 93d Cong. 11 (1973) (statement of Sen. Birch Bayh, Member, Senate Comm.). As Senator Bayh put it: "[W]e need to remove any scintilla of doubt that

the public might have that that judge would be prejudiced." *Id.* at 14 (statement of Sen. Birch Bayh, Member, Comm.).

In an effort to "broaden and clarify the grounds for judicial disqualification" and to conform with the recently adopted Canon 3C of the American Bar Association's Code of Judicial Conduct (1974), Congress amended Section 455 in 1974. H.R. REP. NO. 93-1453 at 6351. The amended § 455 was "designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." *Id.* at 6355. As amended, subsection (a) provides that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a), App. 166. Subsection (b) then enumerates specific circumstances in which a judge must recuse himself, including subsection (b)(1), which states that a judge must disqualify himself "where he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* §§ 455(b) and (b)(1), App. 166.

By amending § 455(a), Congress embraced a new and very different test for determining whether a judge should be disqualified. As the House Report explained, "This sets up an objective standard, rather than the subjective standard set forth in the [old] statute through use of the phrase 'in his opinion.'" H.R. REP. NO. 93-1453 at 6354-55. Congress intended the new test to turn not on whether a judge believed that his own conduct or contacts warranted disqualification, but, instead, on whether a reasonable person would believe the judge was impartial. *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on the Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 93d Cong. 74 (1973) (statement of Sen. Quentin N. Burdick, Chairman, Subcomm.).

Congress also eliminated the duty to sit concept by providing that a judge would be automatically disqualified whenever his "impartiality might be reasonably questioned." *Id.* at 6355. Nothing in the legislative history of

Section 455 suggests Congress intended the 1974 Act to shield a district judge from having his impartiality questioned if the judge unequivocally denied wrongdoing. To the contrary, as set forth above, Congress intended to eliminate the "subjective" opinion of the judge as the test for disqualification and to substitute a reasonable person test.

2. This Court and the courts of appeals have repeatedly confirmed that when faced with a set of facts raising the possibility of disqualification, the central inquiry under section 455(a) is not what a judge thought, believed, knew or intended, but how a reasonable person would regard those facts. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (the appearance of judicial bias, rather than the reality of it, is the true measure of judicial disqualification under Section 455(a)); *United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001); *United States v. Ayala*, 289 F.3d 16 (1st Cir. 2002) (disqualification of a judge is appropriate when the facts asserted provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality); *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120 (2d Cir. 2003) (Section 455(a) governs circumstances that constitute an appearance of partiality, even though actual partiality has not been shown); *In re Kensington Int'l. Ltd.*, 368 F.3d 289 (3d Cir. 2004). Although the test has been characterized in a number of different ways, it was succinctly summarized by the Court of Appeals for the D.C. Circuit itself in another matter: "The question is whether a reasonable and informed observer would question the judge's impartiality." *United States v. Microsoft Corp.*, 253 F.3d at 114.

In this case, although the Court of Appeals paid lip service to the inquiry required by Section 455(a), it conducted that inquiry in a fashion that eviscerated its central purpose and utterly frustrated the intent of Congress. Looking first at the question of whether disqualification was warranted under section 455(b)(1), the Court of Appeals denied the Petitioners' request for mandamus, concluding that it saw "no reason for not

accepting the judge's unequivocal" denial of impropriety during the course of his *ex parte* communications with the Special Master and Special Master-Monitor. *In re Brooks*, 383 F.3d at 1043, App. 12. The Court of Appeals recognized that section 455(a) called for a qualitatively different inquiry, stating correctly that the test was whether "a reasonable and informed observer would question the judge's impartiality." *Id.* at 1043, App. 13. But, having acknowledged the need to apply a different test, the court summarily concluded that the District Court's denial of impropriety was dispositive. Disqualification under section 455(a) was not required, the Court of Appeals held, "for the same reason we determined above that the judge's *ex parte* contacts with the special masters did not give him personal knowledge of disputed evidentiary facts." *Id.*, App. 13. Simply stated, according to the Court of Appeals, a "reasonable and informed observer" would never question a district court's "unequivocal denial" of impropriety.

By relying solely on the District Court Judge's own assessment of his conduct, the Court of Appeals has collapsed the separate inquires called for by subsections (a) and (b)(1) of § 455, and, in so doing, left no meaningful part of § 455(a) intact. In *every* case raising the possibility for disqualification under the specific circumstances of § 455(b)(1), as well as the general standard of § 455(a), a judge will be called upon in the first instance to review facts pointing towards disqualification and to assess the propriety of his own conduct. If, as the Court of Appeals has held here, a district judge's denial of wrongdoing also puts to rest any concern that a "reasonable and informed observer" might harbor about the court's impartiality, there will *never* be a case in which recusal is required, so long as the judge himself does not believe it is warranted. Such a result is squarely at odds with the expressed intent of Congress. Section 455(a) was enacted precisely because Congress was dissatisfied with a scheme in which "the judge himself [was] the sole decider of the substantiality of interest or of the relationships which would be improper and lead to disqualification," H.R. REP. NO. 93-1453 at 6352, and because it was concerned that the public at large lacked

confidence in the integrity of the judicial process. *Id.* at 6355. By hog-tying the perceptions of the "reasonable and informed observer" to a judge's subjective impressions and recollections, the Court of Appeals has, in a single stroke, undone everything that Congress sought to accomplish.

Because Congress was so clear in articulating its goals in enacting section 455(a), we need not pause long to enumerate the problems that will flow from the Court of Appeals' decision in this case. However, one result requires special mention. One of the many virtues of section 455(a), as Congress intended for it to be applied, was that it relieved litigants from the excruciating burden of demonstrating, in a case such as this one, that a judge's own account of events was at odds with objective and undisputed facts. By taking a judge's subjective views out of the equation, section 455(a) permitted litigants to focus solely on how a "reasonable and informed observer" would react to a set of known facts, and not on whether those facts could be reconciled with a judge's own recollection. By contrast, the decision of the Court of Appeals imposes an entirely different burden, requiring a movant for disqualification to challenge the credibility of a judge whose recusal is sought. It is difficult to imagine a result better designed to undermine public confidence in the judiciary or to discourage litigants from raising meritorious challenges under § 455(a). It is likewise hard to conceive of a result that diverges more sharply from what Congress intended.

3. The decision by the Court of Appeals is also in conflict with decisions of the Courts of Appeals for the Third, Fifth, and Seventh Circuits. *See In re Kensington,* 368 F.3d 289, 306 (3d Cir. 2004); *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996); *Hall v. Small Business Admin.,* 695 F.2d 175 (5th Cir. 1983). In each, the courts of appeals were faced with a plausible denial by the district court that it had been influenced by off the record meetings. Nonetheless, the courts of appeals in those circuits held that, although the record did not prove impropriety, the conduct of the judge gave rise to a perception of bias that required disqualification under § 455(a).

Kensington involved a decision by the trial judge to appoint five advisors, experienced as state court judges, lawyers or academics in asbestos or mass tort litigation, to help him preside over five consolidated asbestos related bankruptcies. In a case management conference, the judge in *Kensington* announced that *"[i]n order to effectively case manage complex litigation, it is necessary for the judge to speak and/or meet with attorneys on an ex parte basis, without permission of adversary attorneys . . ." In re Kensington*, 368 F.3d at 297 (emphasis in original). Despite an assurance that he would use this power "sparingly," the judge later acknowledged that he met *ex parte* with interested parties "on innumerable occasions." *Id.* This statement was supported by fee applications filed by the advisors, which revealed more than 325 hours of *ex parte* meetings with the attorneys for various parties in the five asbestos cases, where the judge acknowledged that he received extra-judicial information. *Id.*

Several of the creditors in *Kensington* filed motions for recusal, arguing that the judge was tainted by his meetings with two advisors who, at the same time that they were supposed to be giving neutral advice in the asbestos cases, "represented a class of tort claimants in another unrelated asbestos-driven bankruptcy and espoused views therein on the same disputed issues." *Id.* at 302. The judge emphasized, as in the present matter, that his meetings with advisors "consisted merely of discussions, which he defined as 'consideration of a subject by a group; an earnest conversation,' and that he never received any advice, which he defined as an 'opinion about what could or should be done about a situation or problem.'" *Id.* at 306.

After an initial hearing, the court of appeals determined that it could not reach the merits of the mandamus petitions because the evidentiary record was not adequately developed. *Id.* at 300. Therefore, the court remanded the petitions and the parties conducted extensive discovery into the facts surrounding the recusal motions. The trial court subsequently issued a comprehensive written opinion and order denying the recusal motion. *Id.* He justified his *ex parte* communications on grounds that

they were necessary to give everyone an opportunity to explain why their claims were just and he found that the evidence failed to disclose that there was an appearance of impropriety under section 455(a). *Id.* In particular, the judge observed that the perception of impropriety in the asbestos cases is too complex for the average person to comprehend. He claimed that the reasonable person is someone with experience in mass tort bankruptcies, thus excluding laypersons, or even attorneys not conversant with mass-tort bankruptcy practice. *Id.* at 302.

On appeal, petitioners claimed that the judge had, through his appointment of the Advisors and his participation with them in administering the bankruptcies, created a perception of bias. *Id.* at 296. The Court of Appeals agreed, finding that a reasonable person, knowing all of the circumstances, would question the District Judge's impartiality because the judge's reasoning was in tension with the overriding concern that, "people who have not served on the bench are often too willing to indulge suspicions and doubts concerning the integrity of judges." *Id.* at 302. It also found no precedent for the judge's attempt to put a "gloss" on § 455(a) by claiming that the reasonable person standard referred to someone with experience in mass tort bankruptcies: "We are confident that the average layperson could grasp this alleged impropriety and . . . we perceive no reason to depart from the traditional 'man on the street' standard." *Id.* at 302-303.

Thus, the Third Circuit Court of Appeals joined the Fourth, Fifth and Seventh Circuits in concluding "that the hypothetical reasonable person under § 455(a) must be someone outside the judicial system because judicial insiders, 'accustomed to the process of dispassionate decision making and keenly aware of their constitutional and ethical obligations to decide matters solely on the merits, may regard asserted conflicts to be more innocuous than an outsider would.'" *Id.* at 303 (citing *United States v. DeTemple,* 162 F.3d 279, 287 (4th Cir. 1998)); *see also United States v. Jordan,* 49 F.3d 152, 156-57 (5th Cir. 1995); *In re Mason,* 916 F.2d 384, 386 (7th Cir. 1990).

Central to the court's decision to disqualify was the suspicion created by the *ex parte* nature of the communications between the judge and his advisors. *Id.* at 305. The court noted the district judge's explanation that he met with the Advisors as a group on only four occasions for eighteen hours and that these meetings merely consisted of "discussions" and never "advice." *Id.* at 306. The court was reluctant, however, to rely solely on the judge's recollection, explaining that the judge's distinction between discussions and advice "cuts too fine a line." *Id.* More significantly, the court was concerned with the potential appearance of impropriety created by the meetings. The court looked to the decisions of the Fifth and Seventh Circuits, in the *Edgar* and *Hall* decisions (discussed below), to conclude that "there is an almost irrebutable presumption that a judge is 'tainted' and must be disqualified" where the judge "surrounds himself with individuals who may not be disinterested." *Id.* at 308. The court repeatedly stressed that it did not matter whether the judge had actually been influenced: "Although the record does not demonstrate that Judge Wolin has done anything wrong or unethical or biased, he must be disqualified . . ." *Id.* at 294. The court concluded that the Advisors' unique level of access to the judge gave an appearance of impropriety that required disqualification.

The facts in the present matter are strikingly similar to those in *Kensington.* Here, the District Judge also recognized the need to appoint officers (the Master and Monitor) to assist and consult with him in complex litigation. Like the judge in *Kensington,* the District Judge spent hours meeting with these officers in discussions that "ranged far and wide." *See Cobell,* 226 F. Supp. 2d at 167, App. 136. And, the District Judge made it clear that he was receiving information from them:

> It is sufficient that the Court Monitor has advised this Court regarding his meetings and discussions with third parties and has always informed this Court about the nature, extent, and ***substance*** of such meetings and discussions upon request.

Cobell, 223 F. Supp. 2d at 160, App. 161 (emphasis added). Yet, like the judge in *Kensington,* the District Judge denied that such communications crossed the line such that he could have been influenced. For instance, in his order denying recusal, he explained that when he wrote that the "substance" of meetings had been conveyed to him, he meant only that the "essence" of those meetings had been conveyed, and that while he may have learned "facts" during those meetings, he never learned any "bare" or "naked" facts. *Cobell,* 237 F. Supp. at 92, 98, App. 106, 119. Unlike the Third Circuit, however, the Court of Appeals below failed to appreciate that wholly semantic distinctions, such as the difference between "substance" and "essence," and "facts" and "naked facts," "cuts too fine a line" for purposes of § 455(a). The court also failed to acknowledge that the "reasonable observer" contemplated by § 455(a) would not be reassured by a judge's own assessment of the propriety of his conduct. Instead, in its opinion denying mandamus, the Court of Appeals barely addressed the possibility that the *ex parte* nature of the communications between the judge and his advisors might arouse suspicions in the mind of a reasonable and informed observer. Instead, the court found the reasonable man standard to be satisfied because the District Judge "has stated he did not receive *ex parte* communications substantively related to those proceedings from either Balaran or Kieffer, and we have no reason to conclude he abused his discretion by refusing to recuse himself," *In re Brooks,* 383 F.3d at 1038, App. 2.

In reaching its decision, the *Kensington* court relied on the decisions of the Seventh Circuit Court of Appeals in *Edgar v. K. L.,* 93 F.3d 256 (7th Cir. 1996) and the Fifth Circuit Court of Appeals in *Hall v. Small Business Administration,* 695 F.2d 175 (5th Cir. 1983). Both cases involved similar facts to the case at hand. In *Edgar,* the court appointed a panel of experts to investigate the state's mental health institutions, and those appointees conducted their interviews outside the presence of counsel. Although the parties were aware that the panel had *ex parte* meetings with the judge to discuss administrative issues, the parties eventually learned information suggesting that at least one

of the meetings may have involved a discussion of the merits. *Edgar*, 93 F.3d at 257-258. When the parties moved to recuse the judge, he blocked discovery and denied the motion. *Id.*

On appeal, the Seventh Circuit was concerned by the lack of a record of what information was actually provided to the judge during these sessions. The court held that "off-the-record briefings in chambers" which leave "no trace in the record" require a mandatory disqualification. *Id.* at 259. Rejecting a mechanical distinction based on where the district court acquired knowledge (in the courthouse or out of it) or from whom (directly from a witness or, indirectly, through the court's agent), the court reasoned: "A thoughtful observer aware of all the facts. . . . would conclude that a preview of evidence by a panel of experts who had become partisans carries an unacceptable potential for compromising impartiality." *Id.* at 259-60 (citations omitted). The court also noted that "[e]xperts appointed and supervised by a court carry special weight because of their presumed neutrality," and that the experts appointed by the district court judge were not truly neutral. *Id.* at 261-262. The court reasoned that "[w]hat information passed to the judge, and how reliable it may have been" could not be determined, giving rise to an appearance of impropriety. *Id.* at 259. The same appearance existed in this case, but the Court of Appeals applied a different standard.

In *Hall,* the losing party moved to disqualify the trial judge after trial because it was discovered that, prior to judgment being entered, the judge's law clerk had accepted an offer to join the law firm representing the prevailing party. *Hall,* 695 F.2d at 178. The judge denied the motion on the ground that the law clerk had never expressed an opinion to him about the winning party and because the law clerk had accepted the offer of employment after the judge had written a rough draft of his opinion. *Id.* The Fifth Circuit Court of Appeals reversed, holding that the goal of Section 455(a) "is to exact the appearance of impartiality" and therefore it was immaterial "[w]hether or not the law clerk actually affected the judge's decision." *Id.* at 178, 179. As the court explained, "[j]udicial ethics reinforced by statute exact more than virtuous behavior; they

command impeccable appearance." *Id.* at 176. Furthermore, the court noted that law clerks hold a special position of trust and influence insofar that they are "sounding boards for tentative opinions and legal researchers who seek the authorities that affect the judge's decision." *Id.* at 179. The court held that recusal was required, even though it found "not the slightest hint" that the judge in fact engaged in any improper conduct. *Id.* at 180.

The Court of Appeals in this case, by disqualifying the Monitor, and invalidating the rulings of the Master, acknowledged that both were tainted by personal knowledge they gained from *ex parte* communications and concluded expressly that both had become partisans. In turn, these court officers had an opportunity to taint the judge in the same way as the advisers in *Kensington, Edgar* and *Hall*. In fact, the record of *ex parte* communications here presents an even more compelling case for recusal. For instance, in *Hall,* no particular meetings were identified between the judge and the law clerk, but the Court of Appeals found recusal necessary because the position of trust and confidence placed in the law clerk implied that meetings had taken place. Thus, the mere specter of meetings gave rise to an appearance of bias. In contrast to the absence of evidence of meetings in *Hall*, and the relatively few meetings of short duration at issue in *Kensington* and *Edgar*, the record in this case confirms extensive *ex parte* meetings: The Monitor met with the District Court on over 80 different occasions for which he billed over 120 hours of time; and, the Master held at least seven *ex parte* meetings with the District Court for approximately eight hours.

Singly and together, the opinions of the Third, Fifth and Seventh Circuits are faithful to Congress' goal in enacting section 455(a). They also reflect a sound approach to the appropriate role of a court reviewing a motion for disqualification under section 455(a). Recognizing the fact that the "man on the street" is far less likely to credit the conclusions of what the Third Circuit characterized as a "judicial insider," these courts begin their analyses at precisely the point – the District Court's denial of impropriety – that the Court of Appeals in this case finished its

inquiry. The distinction is neither subtle nor insignificant. Through section 455(a), Congress called upon the courts to safeguard the integrity of the judicial process by foreclosing even the appearance of impartiality. It is in many respects a far simpler task, since it does not impose on the courts the obligation to judge the credibility of one of their colleagues, require a litigant to place a judge's credibility in issue, or invite the need for intrusive discovery. What it does require, however, is a sensitivity to appearance, and a candid recognition that the policies underlying section 455(a) require disqualification even in circumstances where a judge whose conduct is at issue may not believe it is required.

As Congress has made clear through its enactment of section 455(a), this is a matter of singular importance, in which the integrity of the judicial process and public confidence in the fairness of our system of justice is literally in issue. For these reasons, the decision of the Court of Appeals below merits this Court's attention.

CONCLUSION

Petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN RE: PHILLIP A. BROOKS, PETITIONER

No. 03-5047, Consolidated with Nos. 03-5048, 03-5049, 03-5050, 03-5057

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

383 F.3d 1036; 2004 U.S. App. LEXIS 19238

March 15, 2004, Argued
September 14, 2004, Decided

COUNSEL: Robert D. Luskin argued the cause for petitioners. On the petitions for writ of mandamus and reply were Amy Berman Jackson, John Thorpe Richards, Jr., Elizabeth Wallace Fleming, Michael D. Goodstein, Deanna Chang, William H. Briggs, Jr., Marc E. Rindner, Hamilton P. Fox, III, Gregory S. Smith, Thomas E. Wilson, Bradley S. Lui, Dwight Bostwick, and Melissa McNiven.

G. William Austin, III argued the cause for respondents. With him on the response were Dennis M. Gingold, Elliott H. Levitas and Keith Harper.

JUDGES: Before: GINSBURG, Chief Judge, and HENDERSON and RANDOLPH, Circuit Judges.

OPINION BY: GINSBURG

OPINION:

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, Chief Judge: Before us are five petitions for writs of mandamus filed by 11 current and former officials and employees of the Departments of the Interior (DOI) and of Justice. Each of the petitioners was the subject of an investigation, initiated by the district court,

to determine whether that individual should be ordered to show cause why he or she should not be held in contempt for conduct relating to the litigation over the DOI's handling of monies held in trust for individual Indians.

The petitioners originally sought the recusal of District Court Judge Royce Lamberth, Special Master Alan Balaran, and Special Master-Monitor Joseph Kieffer III based upon alleged *ex parte* communications they made or received in the course of that litigation. Special Master Balaran has since resigned and we ordered Special Master-Monitor Kieffer removed in *Cobell v. Norton,* 357 U.S. App. D.C. 306, 334 F.3d 1128 (D.C. Cir. 2003). The petitioners still seek to recuse Judge Lamberth and to suppress the reports and recommendations written (but not filed with the district court) by Special Master Balaran before he resigned.

We now deny the petition to recuse Judge Lamberth from the pending contempt proceedings because he has stated he did not receive *ex parte* communications substantively related to those proceedings from either Balaran or Kieffer, and we have no reason to conclude he abused his discretion by refusing to recuse himself. We do, however, vacate Balaran's proposed reports and recommendations relating to the contempt proceedings.

I. Background

The present petitions and the contempt proceedings to which they relate arise from the ongoing litigation over the DOI's mishandling of the "Individual Indian Money" trust accounts created for each Indian having an interest in certain allotted lands. *See Cobell,* 334 F.3d at 1133. Because the petitioners are not parties to that case, the

facts and the procedural history relevant here may be recounted without laying waste the better part of a forest.

In February 1999 the district court held then-Secretary of the Treasury Robert Rubin, then-Secretary of the Interior Bruce Babbitt, and then-Assistant Secretary of the Interior Kevin Gover, in their official capacities, in civil contempt for violating two discovery orders issued in the trust reform litigation. *See Cobell v. Babbitt,* 37 F. Supp. 2d 6 (D.D.C. 1999). The district court, with the consent of the parties, then appointed Alan Balaran to serve as a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure in order to "oversee the discovery process in this case." In August 1999 the district court additionally authorized Balaran to make "on-site visits to any location where [trust account] Records are maintained" in order to protect such records "from destruction or threatened destruction."

In April 2001 the district court, again with the consent of the parties, appointed Joseph Kieffer to serve for one year as a "court monitor," with a mandate to "monitor and review all of the Interior defendants' trust reform activities and file written reports of his findings with the Court." Kieffer was "permitted to make and receive *ex parte* communications with all entities necessary and proper to effectuate his duties." By October Kieffer had issued four reports. The reports were "unflattering to the DOI" and "prompted the district court to order Secretary Norton and Assistant Secretary McCaleb . . . to 'show cause why they should not be held in civil contempt of court in their official capacities,'" *Cobell,* 334 F.3d at 1135; *see also Cobell v. Norton,* 226 F. Supp. 2d 1, 19 (D.D.C. 2002) (*Contempt Referrals*).

The order to show cause set out five possible reasons (or "specifications") for holding Norton and McCaleb in contempt: four were based upon Court Monitor Kieffer's reports and addressed the DOI's noncompliance with court orders relating to trust reform; the fifth was based upon a report issued in November 2001 by Special Master Balaran concerning the destruction of email records by officials and employees of the DOI. *See Cobell*, 334 F.3d at 1135; *see also Cobell v. Norton*, 237 F. Supp. 2d 71, 76 (D.D.C. 2003) (*Order Denying Recusal*). On September 17, 2002 the district court held both Norton and McCaleb in civil contempt of court upon all five specifications. *Contempt Referrals*, at 161, *rev'd*, 334 F.3d at 1145-50 (vacating contempt charge against Norton because specifications either did not support such a charge or were based upon "conduct of her predecessor," and vacating contempt charge against McCaleb because court did not identify any "specific act or omission whatsoever on his part"). At the same time the district court referred to Balaran (1) the plaintiffs' October 2001 "Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court . . . ," and (2) their March 2002 "Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail." *See Order Denying Recusal*, at 76; *see also Contempt Referrals*, at 155.

With respect to the first motion, the court instructed Balaran to

> develop a complete record with respect to these 37 non-party individuals [and], upon completing his review of these matters, issue a report and

> recommendation regarding whether each individual should be ordered to show cause why he or she should not be held in (civil or criminal) contempt of court, or whether other sanctions are appropriate against such individuals.

Contempt Referrals, at 155. With respect to the second motion, the court instructed him to "issue a report and recommendation regarding the issues raised." *Id.* at 155-56.

Thereafter, 16 of the 37 non-parties named in the September 17 referrals filed motions in the district court to recuse Judge Lamberth, Special Master Balaran, and Special Master-Monitor Kieffer from participating in the contempt proceedings.* They argued that "although the communications between the Court and its special masters were not improper in the context of the underlying litigation," they were inconsistent with participation in the contempt proceedings because "the Master and the Monitor furnished the Court with extrajudicial knowledge about the current litigation." *Order Denying Recusal,* at 77-78. In the alternative, the movants sought discovery regarding the substance of the *ex parte* communications Balaran and Kieffer had with employees and officials of the DOI and with the district judge. The district court denied the motions in their entirety.

In February 2003, 11 of the 16 movants petitioned this court for writs of mandamus providing the same relief.**

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* The district court had renewed Kieffer's appointment in April 2002, this time as a Special Master-Monitor, over the objections of the petitioners.

** In No. 03-5047 petitioner Phillip Brooks seeks to recuse Judge Lamberth or to take discovery of his *ex parte* contacts with Kieffer and

(Continued on following page)

Their petitions were held in abeyance while the court decided *Cobell,* 357 U.S. App. D.C. 306, 334 F.3d 1128, in which we concluded, among other things, that Kieffer's appointment as Special Master-Monitor was not valid because it was made over the objection of the defendants.

Following our decision in *Cobell,* we ordered further briefing and argument on the current petitions. The plaintiffs in the underlying trust reform litigation then responded to the five petitions, and the petitioners filed a consolidated reply. After oral argument on March 15, 2004 we ordered Special Master Balaran to take no further actions with respect to the reports and recommendations he was going to issue pursuant to the September 17 referrals. On April 5 Balaran resigned as a special master both in the contempt proceedings and in the underlying trust reform litigation. With the removal of Kieffer and the resignation of Balaran from all aspects of the *Cobell* litigation, all that remained of the present petitions were the issues relating to the disqualification of the district court judge – or so it seemed.

On April 15, 2004 the plaintiffs filed a "Suggestion of Mootness" in part, arguing there is "no remaining controversy" with respect to Balaran. The petitioners, however,

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Balaran; in No. 03-5048 petitioners Bruce Babbitt, Edith Blackwell, Edward Cohen, John Leshy, and Michael Rosetti seek to recuse Judge Lamberth and Special Master Balaran; in No. 03-5049 petitioners Tom Clark II, Charles Findlay, and John Most also seek to recuse Judge Lamberth and Special Master Balaran; in No. 03-5050 petitioner Anne Shields seeks to recuse Judge Lamberth or to take discovery of his *ex parte* contacts with his judicial officers; and in No. 03-5057 petitioner Sabrina McCarthy seeks to recuse Judge Lamberth or to take discovery of his *ex parte* contacts with his judicial officers and to recuse Special Master Balaran.

responded that the question of Balaran's recusal is not moot because Balaran had completed and, but for our order of March 15, would submit to the district court his reports and recommendations relating to the contempt charges against the 37 individuals who are not parties to the underlying litigation. Therefore, the petitioners claimed "any reports [Balaran] completed after the time he should have been recused would be tainted and invalid and should not be released or shared with the District Court."

II. Analysis

In the light of our earlier disqualification of Special Master-Monitor Kieffer, and of Special Master Balaran's resignation, two questions remain. First, must the district judge, as the petitioners claim, either (a) recuse himself or (b) allow discovery of the *ex parte* communications he had with Kieffer and Balaran? Second, may Balaran submit to the court the reports and recommendations he prepared pursuant to the September 17 referrals?

A. Recusal of the District Judge

A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." *Cobell,* 334 F.3d at 1137. Nonetheless, "we will issue a writ of mandamus compelling recusal of a judicial officer where the party seeking the writ demonstrates a clear and indisputable right to relief." *Id.* at 1139. A party has such a right when a judicial officer has "personal knowledge of disputed evidentiary facts," 28 U.S.C. § 455(b)(1), or when the judicial officer's "impartiality might reasonably be questioned," 28 U.S.C. § 455(a).

The petitioners argue Judge Lamberth should have disqualified himself pursuant to 28 U.S.C. § 455(b)(1) because he acquired personal knowledge of disputed facts through his *ex parte* communications with Kieffer and Balaran. According to the petitioners, Kieffer's time sheets show that he met with the District Judge *ex parte* more than 80 times, for a total of more than 120 hours. Similarly, in the motions for recusal they filed in the district court, the petitioners claimed that Balaran's time records "revealed seven private meetings with the Court for a total of approximately eight hours." *See Order Denying Recusal,* at 89. The petitioners also point to *ex parte* communications Balaran had with numerous individuals involved in the *Cobell* litigation, including DOI officials and employees, plaintiffs' counsel, and the Independent Counsel investigating Secretary Norton, which communications they claim Balaran later "transmitted" to the district court in the form of "memoranda . . . regarding matters such as compliance with discovery obligations [and] sanctions."

The respondents reply that the district court fully addressed each of the petitioners' claims in its ruling denying their motions for recusal. There the district judge acknowledged having met privately with the Court Monitor and the Special Master but rejected any suggestion those meetings constitute a proper ground for his recusal. Far from it, the district court stated:

> It is not only appropriate but necessary for the Court, as principal, to consult with its agents regarding the manner in which they are carrying out their assigned duties. . . . Throughout these regular consultations, the Court discussed with the Master the general nature of the ongoing

> tasks that the Master was involved with, in order to ensure that the Master was responsibly carrying out the duties to which he was assigned.

Id. at 89-90.

The district judge cast additional light upon the nature of his off-the-record meetings in describing his consultations with Kieffer:

> In the course of a typical meeting, for example, the Monitor might inform the Court that he planned to travel to New Mexico to meet with the Office of the Special Trustee, and receive a briefing about their role in the historical accounting process. Or he might explain that he traveled to Billings, Montana to meet with title records office personnel, examine their hard copy records, and review the pilot [Trust Asset and Accounting Management System]. Or he might inform the Court that he had been briefed by the Deputy Commissioner of the Bureau of Indian Affairs about the organization of their office.

Id. at 91-92. The judge concluded that the "subject of these consultations was what the Monitor was doing, not what he was finding"; they did not expose the court to any "bare facts" relevant to the underlying investigation. *Id.* at 92.

The petitioners resist that conclusion upon the basis of statements in two opinions the judge rendered in the course of the *Cobell* proceedings. The first is this snippet from the district court's opinion of September 17, 2002: "The Court is personally aware of the background of the April 19, 2002 meeting, the conversations at that meeting and at the subsequent meetings between the Deputy

Secretary and the Court Monitor." *Cobell v. Norton,* 226 F. Supp. 2d 163, 170 (D.D.C. 2002).*** They also point to the district court's opinion of September 30, 2002 concerning Court Monitor Kieffer's request for compensation, in which the court stated: "It is sufficient that the Court Monitor has advised this Court regarding his meetings and discussions with third parties and has always informed this Court about the nature, extent, and substance of such meetings and discussions upon request." *Cobell v. Norton,* 223 F. Supp. 2d 156, 160 (D.D.C. 2002).

As the respondents point out, the district judge addressed both the quoted statements in his opinion denying the petitioners' motion to recuse, in which he concluded, "Any honest reading of these opinions . . . demonstrates that movants have fundamentally misconstrued" the relevant passages. *Order Denying Recusal,* at 93. With respect specifically to the September 17 opinion, the judge explained that the Deputy Secretary of the DOI had requested that the Court Monitor attend the April 19 meeting in order to resolve a dispute between the Deputy Secretary and the Special Trustee appointed by the court in the underlying trust reform litigation:

> The only reason that the Court knew anything about the April 19 meeting, or the background relating to that meeting, is that the Monitor was compelled to "present[] the facts surrounding the request of the Deputy Secretary" to hold the meeting, in order that the Court could make an

*** Although the petitioners say the opinion is "replete with references to information gathered by the Court Monitor and shared with the District Court," they identify no other and none is apparent to us.

> informed decision about whether to authorize the Monitor's attendance at the meeting.

Id. at 96. So understood, the September 17 opinion does not show that the district judge acquired personal knowledge of disputed evidentiary facts.

Similarly, the district court explained why the single sentence to which the petitioners pointed in the court's September 30 opinion, when viewed in its context, is innocuous. The court was not asking the Court Monitor for substantive information; rather it was asking for information relevant to verifying "the reasonableness and propriety of the Monitor's compensation requests." *Id.* at 97. Thus, the district court reasonably explained that in referring to the "nature, extent, and substance of [Kieffer's] meetings" with third parties, the court was concerned with the subject matter, not the actual content, of those meetings.

The petitioners nonetheless claim the district judge's *ex parte* contacts with Kieffer and Balaran provided him with "information [that] cannot be 'controverted or tested by the tools of the adversary process,'" quoting *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996). Just like the petitioners in *Edgar,* they claim, the "Petitioners here are completely in the dark about what transpired during the Monitor's 120 hours of communications with the Court." The respondents correctly point out, however, that unlike the district judge in *Edgar,* who "declined to state on the record his own memories of what happened" in his private meetings with a panel of court-appointed experts, *id.* at 258, the district judge here declared "unequivocally" he knows of no substantive information that was provided

during any of his consultations with Kieffer or Balaran. *Order Denying Recusal,* at 92; *see also id.* at 90.

Still unappeased, the petitioners question whether the district judge should be relied upon to recall what was discussed in so many unrecorded meetings lasting so many hours. But their question reflects a misconception about the assurance required of the judge: He need not recall all that was discussed at those meetings; he need only recall that the substance of the special masters' findings was not discussed. If, as he represents, that was an implicit ground rule for the conduct of those meetings, then the pertinent question is whether it was ever violated. We see no reason for not accepting the judge's unequivocal response.

Moreover, it is not surprising that the district judge met many times with the Special Master and the Court Monitor; he had to oversee and to coordinate their efforts on the court's behalf during four years of complicated and contentious litigation. Keeping a careful inventory of the tasks they had performed appears sensible, particularly in the light of the defendants' several challenges to Kieffer's and Balaran's requests for compensation. *See, e.g., Cobell,* 223 F. Supp. 2d at 159 (defendants request adjustment or reconsideration of Kieffer's compensation because he "failed to provide sufficiently detailed information about the work performed").

Because neither the proffered evidence of *ex parte* meetings between the court and its agents nor the district court's September 2002 opinions show the judge had acquired "personal knowledge of disputed evidentiary facts," 28 U.S.C. § 455(b)(1), we hold the petitioners have failed to show the "clear and indisputable right" to relief that is required for this court to issue a writ of mandamus.

The petitioners also claim the district judge should be recused because his "impartiality [in any contempt proceedings] might reasonably be questioned," 28 U.S.C. § 455(a), based upon the *ex parte* communications considered above. "The standard for disqualification under § 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge's impartiality." *United States v. Microsoft,* 346 U.S. App. D.C. 330, 253 F.3d 34, 114 (D.C. Cir. 2001). In this case the answer is no, for the same reason we determined above that the judge's *ex parte* contacts with the special masters did not give him personal knowledge of disputed evidentiary facts.

B. Discovery

As an alternative to recusal of the district judge, several of the petitioners claim a right to take discovery of the *ex parte* communications between the judge and his agents. The respondents point out that the petitioners "fail to identify a single case authorizing the discovery they demand under such circumstances." That is not surprising considering the rather extraordinary relief the petitioners request – discovery of the private communications between a district judge and subordinate judicial officers regarding matters the judge has expressly stated are procedural and non-substantive. The petitioners argue that, as in *Edgar,* "The appearance of impartiality concerns are magnified in this case . . . by the District Court's refusal to permit discovery regarding the nature of *ex parte* contacts." In other words, discovery is warranted because the district court's refusal to allow it creates an appearance of partiality that can be dispelled only by allowing discovery. The circularity of this argument is

manifest. In any event, as we have seen, *Edgar* is not on point because the judge in that case "declined to state on the record his own memories of what happened" during his *ex parte* communications with a panel of experts, 93 F.3d at 258, whereas here the district judge has described "the nature of the *ex parte* contacts," and stated unequivocally that those contacts were of a procedural and not a substantive nature. Accordingly, the petitioners have not shown a "clear and indisputable right" to the extraordinary relief they request.

C. The Special Master

Several of the petitioners urge that despite Balaran's resignation "this court must rule on whether the Special Master should have been recused from the contempt proceedings under § 455, and if so, permanently enjoin the release of his report and recommendations and any other work product he may have completed." In reply the respondents argue that vacatur of Balaran's reports and recommendations was not the relief requested in the petitions and is "without justification [and] has no basis in the law." If, however, the September 17 referrals to Balaran as special master in the *Cobell* litigation were made in error because Balaran should have been recused from the contempt proceedings, then any work produced pursuant to the September 17 referrals must also be "recused" – that is, suppressed. We are constrained, therefore, to determine whether Balaran should have been recused from the contempt proceedings.

The petitioners claim Balaran should have been recused from the contempt proceedings under § 455(b)(1) because, as a special master, he had been performing

investigative and adjudicative tasks that entailed *ex parte* communications with witnesses and third parties in the underlying trust reform litigation, as documented in Balaran's time sheets. For example, Balaran had *ex parte* contacts with Dennis Gingold, the plaintiffs' lead counsel, *see, e.g.,* Invoice of 10/7/99, as well as several other of the plaintiffs' attorneys, *see, e.g.,* Invoice of 3/22/00. Balaran also had *ex parte* contacts with unnamed "moles," *see, e.g.,* Invoice of 4/18/01 ("Review submissions from 'Mole 43'"); Invoice of 4/20/01 ("Review correspondence from 'moles' in field"), and unnamed employees at the DOI, *see, e.g.,* Invoice of 2/5/01. Accordingly, the petitioners rely upon *Cobell,* 357 U.S. App. D.C. 306, 334 F.3d 1128, in which we held squarely that "in this Circuit the ethical restrictions of § 455 apply to a special master," *id.* at 1144 (citing *Jenkins v. Sterlacci,* 270 U.S. App. D.C. 296, 849 F.2d 627, 630-32 & n.1 (D.C. Cir. 1988)).

The district court, in denying the petitioners' motions to recuse Balaran, reasoned that the holding in *Cobell* quoted in the previous sentence, because it invoked the precedent of *Jenkins,* did not apply to Balaran as special master in the contempt proceedings:

> [T]he *Jenkins* court took pains to clarify that "*at least insofar as special masters perform duties functionally equivalent to those performed by a judge,* they must be held to the same standards as judges for purposes of disqualification." *Jenkins,* 849 F.2d at 631 n.1. . . . And the litmus test by which special masters are construed to be the "functional equivalent" of judges is the "clearly erroneous" standard of deference.

Order Denying Recusal, at 84-85 (emphasis in original). Because the district court proposed to review Balaran's

findings in the contempt proceedings *de novo* rather than for clear error, *but see* FED. R. CIV. P. 53(e)(2) (2002) ("the court shall accept the master's findings of fact unless clearly erroneous"), it concluded the Special Master's duties would be nonadjudicative in nature, and the Special Master therefore would not be subject to recusal under § 455.

As an initial matter, we note Balaran's own description of his role, in a memorandum sent to "All Counsel" at the outset of the contempt proceedings, which plainly demonstrates the adjudicative nature of his position. For instance, he undertook "preliminarily [to] decide whether the individual Bills of Particular warrant dismissal before initiating any discovery." In any event, we were not in *Jenkins* concerned only with situations in which a special master is the "functional equivalent" of a trial judge because his findings are accorded deferential "clear error" review. Rather, we were concerned with any situation in which "a special master's partiality may operate unchecked and uncheckable by the district court." *Jenkins,* 849 F.2d at 631.

The district court's proposal in this case to review the Special Master's findings *de novo* does not solve the problem of "unchecked and uncheckable" partiality. Balaran's four-year involvement in the trust reform litigation entailed innumerable contacts with witnesses and third parties likely to have information relevant to the contempt proceedings. Inevitably, he would have formed impressions about the character of some, perhaps many, of the individuals named in the contempt proceedings. Consider the letter of January 31, 2001 Special Master Balaran wrote to Phillip Brooks, Esq., one of several attorneys in the Department of

Justice who represented the DOI and later became a subject of Balaran's contempt inquiry:

> I am firmly resolved to expose and reform [Office of Trust Records senior] management infirmities once and for all. What presents a more complicated dilemma is the recent conduct of government counsel. It has come to my attention that certain attorneys currently employed by the Department of Justice and the Office of the Solicitor (in concert with OTR management) have launched a misguided campaign to undermine my authority. These individuals have reportedly gone to great lengths to malign me both personally and professionally in front of [Bureau of Indian Affairs] employees and to misinform these employees as to the true purpose behind my appointment and as to the inherent rights and responsibilities attendant to that position. They have successfully dissuaded BIA/OTR employees from contacting me freely. While I understand that you may choose to discount the credibility of those who chose to report these events to me, rest assured I have spoken to these individuals at length and I am convinced, given the level of detail contained in their reports and my own independent verification, that what I am being told is true.
>
> The question therefore remains how to address government counsel who publicly call into question my ability to read, who liken my investigation to those undertaken by television characters or who insist that I have never practiced law. As I have been called worse things by better lawyers, I will not take these personal insults to heart. I will, however, not tolerate what I consider to be a transparent attempt to undermine

> the Court's orders and I will not accept the conduct of any official who creates an environment where employees fear reprisal simply for contacting my office.

In view of the tone and the substance of this letter, it seems likely, if not inevitable, that Balaran's compilation of the record for the district court's review, not to mention his reports and his recommendations, would be subject to selection bias; at the very least, an observer apprised of all the facts would reasonably question his impartiality. Indeed, if Balaran could properly serve as special master advising the district court whether to initiate contempt proceedings, then it would seem equally permissible for a judge presiding over a criminal proceeding to dispatch his law clerk to visit the scene of the crime, take fingerprints, interview witnesses, and report back to the judge about his findings. The judge's undertaking to review the clerk's findings *de novo* would not be assurance against the biases of the clerk affecting the judgment of the court; so much the worse if the clerk, like Special Master Balaran, had personal knowledge of the parties – and perhaps of the events in suit – from prior dealings with them.

The respondents, echoing the district judge's rationale, in part, for denying the motions to recuse Special Master Balaran, *see Order Denying Recusal,* at 85-88, assure this court that any *ex parte* communications Balaran had with third parties in connection with his duties in the underlying *Cobell* litigation will not taint the contempt proceedings because "his reports to the Court concerning [Information Technology] security and e-mail destruction were not based on any information derived from" those communications. They also note Balaran assured the district court and the parties that his "findings stemming

from proceedings in which the Named Individuals have not been afforded the opportunity to participate and/or comment will not be considered during these proceedings." These assurances do not, however, cure the problem of selection bias. Our concern is not with information that "enters the record and may be controverted or tested by the tools of the adversary process," *Edgar,* 93 F.3d at 259; our concern is with information that "leaves no trace in the record," *id.* – such as Balaran's *ex parte* contacts with "moles" and unnamed DOI employees – that may reasonably be expected to color the way in which he approaches his task, and ultimately his reports and recommendations to the district court, and thus to taint the contempt proceedings despite the steps taken to insulate those proceedings from the information to which Balaran was exposed *ex parte*.

Because the district court's proposed *de novo* review of Balaran's findings does not render his task as special master in the contempt proceedings non-adjudicative, the *ex parte* communications Balaran had in his role as special master in the trust reform litigation required his recusal from the contempt proceeding pursuant to § 455(b)(1). Moreover, the nature and extent of his *ex parte* contacts would lead an informed observer reasonably to question his impartiality, thereby requiring his recusal independently pursuant to § 455(a). We therefore hold the district court erred in failing to grant the petitioners' motions to recuse Balaran.

III. Conclusion

The petitions for a writ of mandamus to recuse Judge Lamberth are denied. Because Special Master Balaran

had *ex parte* contacts that may have given him personal knowledge of disputed evidentiary facts relevant to the contempt proceedings, those proceedings should never have been referred to him. Therefore any reports, recommendations, or other work product Balaran prepared pursuant to the September 17 referrals may not be submitted to the district court or otherwise disseminated in any manner.

So ordered.

ELOUISE PEPION COBELL, ET AL., APPELLEES v. GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

No. 02-5374

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

357 U.S. App. D.C. 306; 334 F.3d 1128; 2003 U.S. App. LEXIS 14433

April 24, 2003, Argued
July 18, 2003, Decided

COUNSEL: Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were Gregory G. Katsas, Deputy Assistant Attorney General, Robert E. Kopp, Director, Thomas M. Bondy and Charles W. Scarborough, Attorneys, Roscoe C. Howard, Jr., U.S. Attorney, Mark E. Nagle and R. Craig Lawrence, Assistant U.S. Attorneys. B. Michael Rauh entered an appearance.

Elliott H. Levitas argued the cause for appellees. With him on the brief were Dennis M. Gingold and Keith M. Harper. George W. Austin entered an appearance.

For GALE A. NORTON, In Her Individual Capacity, Amicus Curiae for Appellant: Herbert Lawrence Fenster, Daniel G. Jarcho, Michael James Bearman, Christina M. Carroll, McKenna Long & Aldridge, Washington, DC.

JUDGE: Before: GINSBURG, Chief Judge, and HENDERSON and RANDOLPH, Circuit Judges. Opinion for the Court filed by Chief Judge GINSBURG.

OPINION BY: GINSBURG, Chief Judge:

OPINION:

GINSBURG, *Chief Judge*: Beneficiaries of Individual Indian Money trust accounts, as a class, sued the Secretary of the Interior and other federal officials, in their official capacities, for breach of fiduciary duty in the management of those accounts. In an earlier appeal, we affirmed the district court's holding that the officials, who serve as trustee-delegates for the federal government, had breached their fiduciary duties, and we remanded the case to that court for further proceedings. *Cobell v. Norton,* 345 U.S. App. D.C. 141, 240 F.3d 1081 (2001) ("*Cobell VI*").

In April 2001, with the consent of the parties, the district court appointed Joseph S. Kieffer III as "Court Monitor" and charged him to "monitor and review all of the Interior defendants' trust reform activities and file written reports of his findings with the Court." In April 2002 the court reappointed Kieffer as Court Monitor, this time over the defendants' objection. On September 17, 2002, the court held Gale A. Norton, Secretary of the Interior, and Neal A. McCaleb, Assistant Secretary of the Interior for Indian Affairs, in contempt of court, elevated Kieffer to the status of "Special Master-Monitor," and scheduled further proceedings. The Department contends that in so doing the district court not only erred, it took control of functions constitutionally reserved to the Executive Branch. We agree that the district court erred, and we reverse Kieffer's reappointment and the citations for contempt. We lack jurisdiction, however, to consider the Department's contention that the court has overstepped its authority.

I. Background

We recounted the long history of the Government's trust responsibilities to Native Americans in *Cobell VI*, and we therefore provide only an abbreviated version of that history here. Pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (formerly codified at 25 U.S.C. § 331 et seq.), lands that had previously been set aside for Indian tribes were allotted to individual Indians in fixed amounts; "surplus" lands were opened to non-Indian settlement. The Act created a system in which allotted lands would be held in trust by the United States for 25 years or more, during which period an individual account ("Individual Indian Money" account or "IIM" account) would be created for each Indian with an interest in the allotted lands. The United States would manage the lands for the benefit of the allottees until the expiration of the trust period, at which time each allottee would be issued a fee patent. The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 et seq.), ended the practice of allotment but extended indefinitely the trust period for already-allotted lands. Through the operation of these two statutes, therefore, the United States came to hold an estimated 11 million acres of land as trustee for, and with a fiduciary duty to, individual Indian beneficiaries. In 1994 the Congress enacted the Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. § 4001 et seq.) ("1994 Act"), recognizing these responsibilities and identifying some of the Government's duties to ensure it meets them. The plaintiffs' lawsuit alleges a breach of these responsibilities.

The duties of the United States as trustee have been delegated to the Secretary of the Interior and the Secretary

of the Treasury, *see* 25 U.S.C. §§ 161-161a, 4001-4011, each of whom is assigned specific tasks. Also relevant to this appeal is the Office of the Special Trustee within the Department of the Interior (and subordinate to the Secretary), which was created by the 1994 Act to oversee the trust reform activities of the Department. *Id.* §§ 4042-4043.

A. Previous Proceedings

The plaintiffs filed this lawsuit in 1996. In 1998 the district court divided the litigation into two "phases." Phase I was to address "fixing the system," that is, "reforming the management and accounting of the IIM trust," and Phase II would concern "correcting the accounts" by "performing a historical accounting of the IIM trust accounts." In 1999 the district court held Secretary of the Interior Bruce Babbitt, Assistant Secretary Kevin Gover, and Secretary of the Treasury Lawrence Summers had breached their fiduciary duties. The court issued a declaratory judgment to that effect and remanded the case to the Interior and Treasury Departments for them to bring themselves into compliance with the law, and to take certain steps the court deemed necessary to provide an accounting of the IIM trust. *Cobell v. Babbitt,* 91 F. Supp. 2d 1, 58 (D.D.C.) ("*Cobell V*"). In order to assure the defendants' compliance, the court retained jurisdiction and ordered the defendants to file quarterly status reports "setting forth and explaining the steps that defendants have taken to rectify" the breach. *Id.* at 59. Finally, the court certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.*

In February 2001 we affirmed the order of the district court: The Government indeed had breached its fiduciary duty. Among many other things, it "does not know the precise number of IIM trust accounts that it is to administer and protect," and "it does not know the proper balances for each IIM account." *Cobell VI,* 240 F.3d at 1089. Although we determined that the district court had mischaracterized some of the defendants' actions – for instance, their failure to "retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting" – as independent violations of a fiduciary duty, rather than as "support for the . . . court's ultimate conclusion that appellants have unreasonably delayed the discharge of their fiduciary obligations to IIM beneficiaries," 240 F.3d at 1104, 1105, we upheld the district court's "ultimate conclusion" as fully justified. *Id.* at 1105. We also held the district court's remand of the matter to the agencies and its retention of jurisdiction were appropriate remedies. *Id.* at 1107-09.

B. The Orders on Appeal

While *Cobell VI* was pending before us and thereafter, the Department and its officers took a number of steps relevant to this appeal. Beginning in March 2000 and continuing apparently to the present, the Department filed the quarterly reports required by *Cobell V.* In April 2000 the Department published a notice in the Federal Register proposing a method for performing an historical accounting and seeking public comment thereon; and in December 2000 it chose statistical sampling as the method it would use.

In April 2001 the district court appointed Kieffer as Court Monitor. As noted, the Department consented to this appointment, regarding which it expressed the "hope that this will in fact be a positive step forward so that resources can be more directed towards trust reform and less directed towards litigation." The order appointing Kieffer stated he would "serve for at least 1 year from this date. Upon order of the Court, after comment or objection thereto by the parties, his term of service may be extended for additional terms." In April 2002 the district court "proposed to extend Mr. Kieffer's term of service for at least an additional year." The Department objected to Kieffer's reappointment unless several conditions were met. The district court accepted some but not all those conditions, and reappointed Kieffer.

Four days later (April 19) Kieffer, with authorization from the district court, attended a meeting with Deputy Secretary of the Interior J. Steven Griles, the Special Trustee, and other departmental officials; the plaintiffs were not represented at the meeting. The district court found this was one of many internal DOI meetings Kieffer attended; the meeting was called at Griles's request; it was a "heated meeting [that] resolved nothing." The district court also found that at the meeting the Court Monitor discussed with Interior officials his concerns about the way they were doing their jobs – concerns that he was subsequently to report to the district court. The district court characterized Kieffer's actions as "an effort to set the stage to convince the parties attending the meeting to find some way to work together."

On June 14 the Department moved the district court to revoke Kieffer's appointment as, and to clarify the role of, the Court Monitor. The Department argued that its

previous objections "presaged" the April 19 meeting, at which, the Department claimed, Kieffer demonstrated his intention and his ability to assert powers constitutionally reserved to the Executive Branch of the Government.

Meanwhile the Monitor's reports, which were, to say the least, unflattering to the DOI, had prompted the district court to order Secretary Norton and Assistant Secretary McCaleb, both of whom had taken office in 2001, to "show cause why they should not be held in civil contempt of court in their official capacities" on five "specifications," namely:

> (1) Failing to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project.
>
> (2) Committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000, until January 2001.
>
> (3) Committing a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999.[*]
>
> (4) Committing a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and

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* TAAMS, the Trust Asset and Accounting Management System, is a new computer system expected to enable Interior better to track the status of property held in trust for IIM account beneficiaries.

> BIA [Bureau of Indian Affairs] Data Clean-up.[**]
>
> (5) Committing a fraud on the court by making false and misleading representations starting in March, 2000, regarding computer security of IIM trust data.

Cobell v. Norton, 226 F. Supp. 2d 1, 19-20 (D.D.C. 2002) ("*Contempt Opinion*"). The district court held a 29-day bench trial on the contempt charges.

On September 17, 2002 the district court issued the three Orders that are the subject of this appeal. First, the court issued an Order that, among other things, held Secretary Norton and Assistant Secretary McCaleb "in civil contempt of court." *Cobell v. Norton,* 226 F. Supp. 2d 1, 161 (D.D.C.) ("*Contempt Order*"). The *Contempt Order* was accompanied by and explained in the *Contempt Opinion,* released simultaneously. Second, the district court issued a Memorandum and Order denying the defendants' motion to revoke Kieffer's appointment as Court Monitor. *Cobell v. Norton,* 226 F. Supp. 2d 163 (D.D.C.) ("*Monitor Order*"). Finally, the court issued an Order appointing Kieffer to serve as "Special Master-Monitor" "[p]ursuant to Rule 53 of the Federal Rules of Civil Procedure." *Cobell v. Norton,* 2002 U.S. Dist. LEXIS 17354, at *1 (D.D.C.) ("*Special Master-Monitor Order*").

In the *Contempt Order,* the court addressed each of the five specifications of contempt. With regard to the first count, the court described Norton's and McCaleb's failure

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** "BIA Data Clean-up" refers to Interior's effort to remedy shortcomings in the data in the Department's current computer systems so that those data can be transferred into TAAMS.

to comply with its earlier order as "litigation misconduct." In each of the other specifications, the court found Norton and McCaleb to have "committed a fraud on the Court." 226 F. Supp. 2d at 161. The district court used some harsh words in the *Contempt Opinion,* expressing its dissatisfaction with the defendants' conduct. *See, e.g.,* 226 F. Supp. 2d at 125 ("The Department of Interior is truly an embarrassment to the federal government in general and the executive branch in particular. The 300,000 individual Indian beneficiaries deserve a better trustee-delegate than the Secretary of Interior"); *id.* at 113 ("The Court is both saddened and disgusted by the Department's intransigence"). Of particular note are the district court's statement that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place alongside former-Secretary Babbitt and former-Assistant Secretary Gover in the pantheon of unfit trustee-delegates," *id.* at 161, and the court's invitation to Secretary Norton or any other individual at the Department who "feels that as a result of the Court's ruling they are unable or unwilling to perform their duties to the best of their ability" to "leave the Department forthwith." *Id.* at 133.

Turning to the question of relief, the court refused the plaintiffs' request that it appoint a receiver to take over the IIM trust. The court did, however, determine that the relief it had ordered in *Cobell V* – remanding the case to the agencies to carry out their duties as instructed – "was and is insufficient," *id.* at 147, and it therefore contemplated "granting further injunctive relief." *Id.* at 148. To that end the court scheduled further proceedings, which it called the "Phase 1.5 trial." *Id.* In order to prepare for the Phase 1.5 trial, the court required Interior to file "a plan for conducting a historical accounting of the IIM trust

accounts" and "a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries." *Contempt Order,* 226 F. Supp. 2d at 162. The court also permitted the plaintiffs (and the Department of the Treasury) to file such plans, and permitted each party to respond to any other party's plan. *Id.*

In the *Monitor Order,* the court denied the Department's June 14 motion to revoke the appointment of Court Monitor Kieffer. The court found that Kieffer's participation in the April 19 meeting was not inappropriate or beyond his authority because it was "pursuant to the Secretary of the Interior's *own request*" and "in conformance with the Orders of the Court." 226 F. Supp. 2d at 169. Finally, in the *Special Master-Monitor Order,* the court sua sponte elevated Kieffer to the position of Special Master-Monitor; Kieffer retained his duties as Court Monitor and as Special Master assumed new responsibilities for the management of discovery. 2002 U.S. Dist. LEXIS 17354, at *4-7.

Secretary Norton and Assistant Secretary McCaleb appealed all three Orders of the district court. They argue that the district court overstepped the bounds of judicial authority by declaring them "unfit" and by "seizing control of the processes for creating and implementing plans for Indian trust reform." They also argue that the district court erred when it held them in contempt of court, denied their motion to terminate Kieffer's tenure as Court Monitor, and appointed him Special Master-Monitor.***

*** Norton and McCaleb also moved to present arguments in their individual capacities. Construing these as motions to appear as amici

(Continued on following page)

II. Analysis

We understand the Government to object to three distinct aspects of the district court's Orders in this case: (1) the court's alleged overreaching through its "assum[ption of] control" over functions within the DOI; (2) the court's decisions regarding the status of Mr. Kieffer; and (3) the court's holding Secretary Norton and Assistant Secretary McCaleb in contempt of court. Before we may reach these issues, however, we must confirm our jurisdiction over this interlocutory appeal.

A. Jurisdiction

The Department argues we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1). In the alternative it seeks a writ of mandamus.

Section 1292(a)(1) provides that "the courts of appeals shall have jurisdiction of appeals from . . . interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." As the Supreme Court stated in *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 67 L. Ed. 2d 59, 101 S. Ct. 993 (1981), § 1292(a)(1) provides jurisdiction over not just an injunction so-denominated, but over any order having the "practical effect" of an injunction if the order threatens a "serious, perhaps irreparable, consequence" and is of such a nature that it can be "effectually challenged only by immediate appeal." "An order by a federal court that relates only to the conduct or progress of litigation before that court

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curiae, we grant them and dispose of other motions pending in this case in an order issued today.

ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 279, 99 L. Ed. 2d 296, 108 S. Ct. 1133 (1988).

A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." *Id.* at 289. Mandamus does not lie unless the petitioner's right to relief is "clear and indisputable," and there is "no other adequate means" by which the petitioner may attain the relief it seeks. *In re Sealed Case,* 331 U.S. App. D.C. 385, 151 F.3d 1059, 1063 (D.C. Cir. 1998).

With these legal principles in mind, we consider our jurisdiction over each of the Department's three claims.

1. Judicial Overreaching

The Department argues we have jurisdiction over its claim of judicial overreaching pursuant to § 1292(a)(1) because the district court's rulings (1) imposed an injunction; or (2) had "the practical effect of an injunction"; or (3) worked "a modification of a declaratory judgment that the [district] court has [since] held to be indistinguishable from a mandatory injunction." The gravamen of the Department's argument, however expressed, is that the district court orders "both require[] action and implicitly enjoin[] the Secretary's future exercise of discretion."

We disagree. As the plaintiffs demonstrate, the *Orders* and the *Opinion* were full of sound and fury, but they signified very little to be done by the DOI. In the *Contempt Order* the court appointed a Special Master-Monitor, 226 F. Supp. 2d at 163 ¶¶ 13-16, and required the defendants, in anticipation of the Phase 1.5 trial, to "file with the

Court . . . a plan for conducting a historical accounting of the IIM trust accounts" and to file a plan for "bringing themselves into compliance with [their] fiduciary obligations." *Id.* at 162 ¶¶ 2, 3. It also held Secretary Norton and Assistant Secretary McCaleb in contempt, *id.* at 161 ¶¶ 1-5, and ordered them to pay the expenses the plaintiffs had incurred for the contempt trial. *Id.* at 162 ¶¶ 9-10.****

None of this had the "practical effect" of an injunction. The *Contempt Order* compels the Department only to prepare for the Phase 1.5 proceedings by making certain filings with the court. As such, we think it more akin to an "order . . . relating only to the conduct or progress of litigation," *Gulfstream Aerospace,* 485 U.S. at 279, than to an injunction.

The Department also points to the district court's statement that it will order new relief following the Phase 1.5 trial rather than "simply remanding the matter back to the agency," *Contempt Opinion,* 226 F. Supp. 2d at 152, as evidence that the court intends to take over the management of trust reform. Such a claim is premature. To be sure, the district court stated it "has determined that it will grant further injunctive relief," *id.* at 146 – specifically, "a structural injunction," *id.* at 146 n.154 – presumably upon completion of the Phase 1.5 trial. Any such injunction, once issued, would be appealable under § 1292(a)(1). But no such injunction has yet issued. At worst, the district court has threatened to take action that,

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**** In the *Contempt Order* the district court also entered a declaratory judgment on an unrelated matter, *see* 226 F. Supp. 2d at 161-62 ¶ 1, and referred certain matters to another special master. *Id.* at 162-63 ¶¶ 11-12. The Department does not seek review of those provisions of the *Contempt Order.*

according to the Department, would violate the separation of powers. Until the district court takes such action, however, we are without power under § 1292(a)(1) to review its decisions.

Anticipating that the court might lack jurisdiction to hear the present appeal, the Department asks us in the alternative to issue a writ of mandamus providing equivalent relief. But we may not do that, either. The Department's challenge does not meet the criteria for the writ; in particular, the Department has not shown that an appeal from the district court's eventual entry of an injunction, if and when that occurs, would not provide it with adequate relief.

2. Kieffer's Appointment as Monitor and as Special Master-Monitor

The Department concedes that "the court's order elevating the Court Monitor to the judicial role of Special Master would not generally be immediately appealable." Nevertheless the Department claims that Kieffer's appointment is subject to interlocutory review both because it "forms an integral part of the relief the court believed was required" and because it "has the effect of an injunction." These claims are essentially a restatement of those we have already rejected as part of the Department's claim of judicial overreaching. We see no need to revisit them under a new heading.

The orders appointing Kieffer – first as Court Monitor, and later as Special Master-Monitor – and the order denying the Department's motion to revoke Kieffer's appointment as Court Monitor do, however, present an appropriate occasion for mandamus. First, as we explain

below (in Part II.B), the Department's entitlement to relief is clear. Second, there is no other way for the Department to obtain effective relief on its claims that Kieffer should not have been appointed Special Master-Monitor, nor permitted to continue as Court Monitor.

The ordinary route to relief from an adverse interlocutory order is to appeal from the final judgment. When the relief sought is recusal of a disqualified judicial officer, however, the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable. As the Supreme Court has explained:

> The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

Berger v. United States, 255 U.S. 22, 36, 65 L. Ed. 481, 41 S. Ct. 230 (1921); *see In re United States,* 666 F.2d 690, 694 (1st Cir. 1981) ("A case involving a motion for disqualification is clearly distinguishable from those where a party alleges an error of law that . . . may be fully addressed and remedied on appeal"). The parties agree that after his elevation to Special Master-Monitor status, Kieffer was serving as a judicial officer.

Although this court does not seem to have ruled upon the propriety of seeking the recusal of a judicial officer by petition for a writ of mandamus, every circuit to have addressed the issue has found it proper. The First through Seventh Circuits and the Tenth Circuit have each issued the writ for this purpose, *see In re Boston's Children First,*

244 F.3d 164 (1st Cir. 2001); *In re IBM Corp.*, 45 F.3d 641 (2d Cir. 1995); *In re Antar,* 71 F.3d 97 (3d Cir. 1995); *In re Sch. Asbestos Litig.*, 977 F.2d 764 (3d Cir. 1992); *In re Rodgers,* 537 F.2d 1196 (4th Cir. 1976); *In re Faulkner,* 856 F.2d 716 (5th Cir. 1988); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136 (6th Cir. 1990) (en banc); *In re Hatcher,* 150 F.3d 631 (7th Cir. 1998); *In re Edgar,* 93 F.3d 256 (7th Cir. 1996); *Nichols v. Alley,* 71 F.3d 347 (10th Cir. 1995), and the Eighth, Ninth, and Eleventh Circuits have suggested they would do so in an appropriate case. *See Pfizer, Inc. v. Lord,* 456 F.2d 532, 536-37 (8th Cir. 1972) (holding mandamus is an appropriate avenue to review recusal decision but denying the writ on the facts presented); *Cordoza v. Pac. States Steel Corp.,* 320 F.3d 989, 999 (9th Cir. 2003) (similar); *In re Lopez-Lukis,* 113 F.3d 1187, 1188 (11th Cir. 1997) (denying writ seeking review of recusal decision because "petitioners have not carried their burden of showing their right to issuance of a writ of mandamus"). The Federal Circuit looks to the law of the regional circuit in which the officer to be recused sits. *Baldwin Hardware Corp. v. FrankSu Enter. Corp.,* 78 F.3d 550, 556-57 (1996); *In re Solex Robotics, Inc.,* Misc. No. 725, 56 Fed. Appx. 490, 2003 U.S. App. LEXIS 1595 (Jan. 17, 2003) (unpublished). We join the unanimous view of our sister circuits and hold that we will issue a writ of mandamus compelling recusal of a judicial officer where the party seeking the writ demonstrates a clear and indisputable right to relief.

We also find it appropriate to issue the writ in order to clarify that the district court exceeded its authority when it reappointed Kieffer as Court Monitor over the Department's objection. As we discuss below, the Department's right to relief is clear, and the injury it alleges – interference with the internal deliberations of a Department of

the Government of the United States – cannot be remedied by an appeal from the final judgment. *In re Sealed Case,* 151 F.3d at 1063.*****

3. Contempt Findings

The district court styled the contempt in which it held the appellants civil in nature. In this circuit an order holding a party in civil contempt in an on-going proceeding is not appealable as a final order. *Byrd v. Reno,* 336 U.S. App. D.C. 363, 180 F.3d 298 (D.C. Cir. 1999) (per curiam). In contrast, "criminal contempt judgments are immediately appealable pursuant to § 1291 because they result from a separate and independent proceeding . . . to vindicate the authority of the court and are not a part of the original cause." *Marrese v. Am. Acad. of Orthopaedic Surgeons,* 470 U.S. 373, 379, 1331, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985). As we explain below (in Part II.C.1), the district court's findings of contempt are functionally criminal rather than civil in nature. Therefore, we have jurisdiction over this appeal from the contempt aspects of the *Contempt Order*.

***** The plaintiffs contend we should not issue the writ because the Department did not file a separate petition for mandamus, which they claim is required by Federal Rule of Appellate Procedure 21 and Circuit Rule 21. For its part, the Government points to our prior decision treating an improper interlocutory appeal as a petition for mandamus, *Ukiah Adventist Hosp. v. FTC,* 299 U.S. App. D.C. 54, 981 F.2d 543, 548 & n.6 (1992), in the light of which we deem the Government's omission excusable.

B. Court Monitor/Special Master-Monitor Issues

We turn now to the merits of the Department's claim the district court erred by retaining Kieffer in this case. Specifically, the Department argues both that the court had no authority to reappoint Kieffer as Court Monitor over its objection, and that Kieffer was disqualified from serving as Special Master-Monitor due to his personal knowledge of the case and the resulting appearance of partiality.

1. Court Monitor

Kieffer was appointed Court Monitor on April 16, 2001, with the consent of the parties, for a term of one year. In April 2002 the Government objected to Kieffer's reappointment unless certain conditions were placed upon the scope of his powers. On April 15, 2002, the district court reappointed him without regard to one of those conditions. The Department claims this was a clear error. We agree.

The district court claimed authority to appoint the Monitor in the first instance based upon the "consent of the [parties], and . . . the Court's inherent powers." The Government claims it did not consent to Kieffer's reappointment, however, and neither the district court nor the plaintiffs point to any case or other authority suggesting a district court has inherent power to appoint a court monitor. Indeed, in their brief the plaintiffs, tellingly, do not address the Department's argument that the district court could not appoint a court monitor over its objection. At oral argument the plaintiffs instead rested upon the assertion that the DOI's consent to Kieffer's original appointment as Court Monitor was temporally unlimited and irrevocable.

The plaintiffs' position is untenable on the facts of this case. First, the district court did not propose or purport to appoint Kieffer permanently, so the DOI had no occasion to consent to his having an unlimited tenure. As we noted earlier, the order appointing him stated that Kieffer would "serve for at least 1 year from this date. Upon order of the Court, after comment or objection thereto by the parties, his term of service may be extended for additional terms." The plaintiffs' suggestion that this order, which explicitly grants the parties the right to object to Kieffer's reappointment, actually served as consent to his unlimited tenure, is absurd. We conclude the Department effectively withheld its consent to the court's reappointment of Kieffer as Monitor, which brings us to the question whether the district court has inherent power to appoint a monitor without the consent of the party to be monitored.

A judicial claim to an "inherent power" is not to be indulged lightly, lest it excuse overreaching "the judicial Power" actually granted to federal courts by Article III of the Constitution of the United States, and the customs and usages that inform the meaning of that phrase. Such a claim, therefore, must either be documented by historical practice, *see, e.g., Miner v. Atlass,* 363 U.S. 641, 643-44, 4 L. Ed. 2d 1462, 80 S. Ct. 1300 (1960) (rejecting contention that federal court sitting in admiralty has inherent power to order taking of depositions for discovery because there was no historical record of courts ordering such depositions); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 629-30, 631, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962) (noting court's inherent power to dismiss suit for failure to prosecute dates to Blackstone's Commentaries and "has long gone unquestioned"), or supported by an irrefutable showing that the exercise of an undoubted authority would otherwise be set to naught.

See, e.g., Chambers v. NASCO, 501 U.S. 32, 43, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) ("It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others"); *cf.* All Writs Act, 28 U.S.C. § 1651(a) (granting federal courts power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). Often the two go hand in hand. *See, e.g., Fisher v. Pace,* 336 U.S. 155, 159, 93 L. Ed. 569, 69 S. Ct. 425 (1949) ("Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute"). In this case, however, we find nothing but the district court's assertion it has inherent power to appoint a monitor, which can hardly be self-supporting. Therefore, we hold the district court does not have inherent power to appoint a monitor – at least not a monitor with the extensive duties the court assigned to Kieffer – over a party's substantial objection, here the Government's objection that the appointment violated the separation of powers. As the foregoing sentence conveys, our holding is a narrow one, tethered to the peculiar facts recounted below.

In this case the Court Monitor was charged to "monitor and review all of the Interior defendants' trust reform activities" and to report to the district court on "any . . . matter [he] deemed pertinent to trust reform." The court authorized the Monitor to engage in ex parte communications, and required the DOI to "facilitate and assist" the

Monitor, to "provide [him] with access to any . . . offices or employees to gather information," and to pay his hourly fees and expenses. In short, the Monitor acted as an internal investigator, not unlike a departmental Inspector General except that he reported not to the Secretary but to the district court.

Although the Department initially consented to this arrangement, after a year's experience it conditioned its renewed consent upon a narrower and more specific definition of the Monitor's role: The DOI sought to limit the scope of the Monitor's investigation to "steps taken by the Department to rectify the breaches of trust declared by the Court or steps taken that would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." It later augmented its objection to the Monitor's role, arguing that the Monitor's broad-ranging investigation interfered with the Department's deliberative process privilege under *Hinckley v. United States,* 329 U.S. App. D.C. 315, 140 F.3d 277, 284-85 (D.C. Cir. 1998) (describing privilege as protecting materials that are both "predecisional" and "deliberative"); *see also Morgan v. United States,* 304 U.S. 1, 18, 82 L. Ed. 1129, 58 S. Ct. 773, 58 S. Ct. 999 (1938) ("It was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he [did what] the law required"), and that the Monitor otherwise intruded unduly into the function of the Executive Branch. We need not decide, however, whether the Department's objection was meritorious; it is enough for present purposes that the objection was colorable.

Regardless whether the district court has any inherent authority to appoint an agent to monitor the conduct of a party in litigation before it, it was surely impermissible

to invest the Court Monitor with wide-ranging extrajudicial duties over the Government's objection. The Monitor's portfolio was truly extraordinary; instead of resolving disputes brought to him by the parties, he became something like a party himself. The Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system. When the parties consent to such an arrangement, we have no occasion to inject ourselves into their affairs. When a party has for a nonfrivolous reason denied its consent, however, the district court must confine itself (and its agents) to its accustomed judicial role.

Although the plaintiffs did not bring it to our attention, we are aware of the practice of a federal district court appointing a special master pursuant to Rule 53 to supervise implementation of a court order, especially a remedial order requiring major structural reform of a state institution. *See, e.g., Ruiz v. Estelle,* 679 F.2d 1115, 1161-62 (5th Cir.) (prison reform), *amended in part, reh'g denied in part on other grounds,* 688 F.2d 266 (5th Cir. 1982); *Halderman v. Pennhurst State Sch. & Hosp.,* 612 F.2d 84, 111 (3d Cir. 1979) (en banc) (reform of institution for the mentally retarded), *rev'd on other grounds,* 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981); *Gary W. v. State of Louisiana,* 601 F.2d 240, 244-45 (5th Cir. 1979) (same); *id.* (collecting cases); Ross Sandler & David Schoenbrod, Democracy by Decree 55-57 (2003). Putting aside the question whether those cases shed any light whatsoever upon the propriety of a federal court authorizing its agent to interfere with the affairs of another branch of the federal government, we think the present case goes far beyond the practice that has grown up under Rule 53.

Ruiz illustrates the limits of the mandate a district court may permissibly give its agent. There the district court, having found the defendant state department of corrections subjected inmates to cruel and unusual conditions, entered an injunction and appointed a special master, assisted by several "monitors," 679 F.2d at 1159, "to monitor implementation of the relief ordered." *Id.* at 1128. The special master was given "unlimited access to [the defendants'] premises and records as well as the power to conduct confidential interviews with . . . staff members and inmates." *Id.* at 1162. On appeal, the State argued the appointment was improper because there was no "exceptional condition" warranting it, as required by Rule 53. In rejecting that argument, the court of appeals approved the special master's mandate, namely, "to report on [the department's] compliance with the district court's decree and to help implement the decree," thereby "assuming one of the plaintiffs' traditional roles." *Id.* at 1161.

The role of the special master in *Ruiz* was not nearly as broad as the role of the Monitor in this case. There the master was specifically instructed "not to intervene in the administrative management of [the department] and . . . not to direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance." *Id.* at 1162. Most important, the court of appeals clarified that the special master and the monitors were "not to consider matters that go beyond superintending compliance with the district court's decree," thereby assuring the special master would not be an "advocate" for the plaintiffs or a "roving federal district court." *Id.*

The last requirement highlights the problems with the role of the Monitor in this case, and with his appointment.

The Monitor was not limited to "superintending compliance with the district court's decree," but was instead ordered to "monitor and review all of the . . . defendants' trust reform activities," including "the defendants' trust reform progress and any other matter Mr. Kieffer deems pertinent to trust reform." Nor could the Monitor have been limited to enforcing a decree, for there was no decree to enforce, let alone the sort of specific and detailed decree issued in *Ruiz* and typical of such cases. *See* Sandler & Schoenbrod, above, at 9 (referring to "court decrees that are as thick as phone books"). The case had been remanded to the Department "for further proceedings not inconsistent with" the opinion of the district court in order "to allow defendants the opportunity to promptly come into compliance." *Cobell V,* 91 F. Supp. 2d at 58. *Cf., e.g., Halderman,* 612 F.2d at 111 (allowing special master to administer implementation of injunction and noting that "masters are peculiarly appropriate in the implementation of complex equitable decrees which require ongoing judicial supervision"). In this case, the district court's appointment of the Monitor entailed a license to intrude into the internal affairs of the Department, which simply is not permissible under our adversarial system of justice and our constitutional system of separated powers. Accordingly, the district court should not have reappointed the Court Monitor on April 15, 2002 over the Department's objection.

2. Special Master-Monitor

In its June 14 motion to revoke Kieffer's appointment and clarify the role of the Court Monitor, the Department among other things complained that Kieffer's actions at

the April 19, 2002 ex parte meeting had created an appearance of partiality. The district court not only rejected the Department's arguments, it supplemented Kieffer's role by appointing him Special Master-Monitor. Again the Department claims this was clear error. Again we agree.

The relevant standard is to be found at 28 U.S.C. § 455(a): A judicial officer must be disqualified from "any proceeding in which his impartiality might reasonably be questioned," that is, questioned by one fully apprised of the surrounding circumstances. *Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co., Inc.,* 535 U.S. 229, 232-33, 152 L. Ed. 2d 346, 122 S. Ct. 1290 (2002) (per curiam). It is clear, notwithstanding the plaintiffs' objections, that in this Circuit the ethical restrictions of § 455 apply to a special master. *Jenkins v. Sterlacci,* 270 U.S. App. D.C. 296, 849 F.2d 627, 630-32 & n.1 (D.C. Cir. 1988). So much for the law; for the facts we rely solely upon the district court's own recitation, which establishes that Kieffer's prior role and personal involvement in this case as Court Monitor would cause a reasonable person to doubt his ability to remain impartial while serving as Special Master.

For instance, Kieffer was "permitted to make and receive ex parte communications with all entities," *Monitor Order,* 226 F. Supp. 2d at 165, and in fact engaged in numerous ex parte communications with officials of Interior. *Id.* at 167. Moreover, in the course of his investigation Kieffer acquired information upon the basis of which he "apprised the Deputy Secretary that there was a dispute developing between the Secretary and the Special Trustee . . . regarding the appropriate role of the Special Trustee." *Id.* at 170. The Court Monitor was also present at the "heated" ex parte meeting on April 19, 2002, about

which he reported to the Court that "defendants were unwilling to fully accept the Congressionally-mandated role of the Special Trustee." *Id.* at 171. At that meeting, Kieffer "expressed his concerns to the Deputy Secretary about the actions of the Secretary and the Deputy Secretary regarding the Special Trustee." *Id.* In particular, he "apprised the Deputy Secretary in the presence of the Special Trustee of the obvious risks faced by the defendants in this litigation and the additional concerns he had regarding" some of the Secretary's views, in "an effort to set the stage to convince the parties attending the meeting to find some way to work together rather than continue the internecine warfare patently obvious in their own dueling memoranda." *Id.* at 172.

The district court's account of these events demonstrates that Kieffer had a settled opinion about what the Department should and should not do on remand to comply with the order of the district court, which opinion he developed in his extrajudicial role as Court Monitor with access to the internal deliberations of the Department regarding the lawsuit. The district court's account also demonstrates that Kieffer's opinion was based in part upon ex parte communications received in his extrajudicial capacity as Monitor. These facts so clearly cast a shadow over Kieffer's impartiality that the district court abused its discretion in appointing Kieffer to be Special Master (in addition to Monitor).

The plaintiffs argue the April 19 meeting was not "extrajudicial" because it took place with the knowledge and approval of the district court and of the parties. That does not change the key fact: The district court appointed Kieffer to a judicial role in a case in which he had significant prior knowledge obtained in his role as a Court Monitor,

on the basis of which he had formed and expressed opinions of continuing relevance to the litigation. A newly appointed judge may not hear a case in which he previously played any role. *See* 28 U.S.C. § 455(b)(3) (a judge shall recuse himself "where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy"); ABA Model Code of Judicial Conduct Canon 3(E)(1)(b) (a judge is disqualified when "the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it"). Similarly here, Kieffer's experience as Court Monitor disqualified him from later assuming a judicial role in this case. Accordingly, the order appointing Kieffer to be a Special Master-Monitor must be vacated.******

****** In light of this disposition we need not and do not pass upon the DOI's objections to the propriety of Kieffer's actions at the April 19 meeting or at any other time prior to his appointment as Special Master-Monitor. The events of April 19 do, however, suggest the Department's concerns about the scope of the Court Monitor's role were well-founded. The district court's findings indicate that the Court Monitor's duties were so wide-ranging as to have a potentially significant effect upon the DOI's deliberative process. *See Monitor Order,* 226 F. Supp. 2d at 172 (Court Monitor's presentation was "an effort to set the stage to convince the parties attending the meeting to find some way to work together"); *id.* (Court Monitor "sought to . . . enable [DOI officials] to better carry out [their] trust reform fiduciary obligations"); *id.* at 172 n.6 (Court Monitor, with authorization of district court, "attempted to facilitate a resolution of the continuing dispute between the Secretary, the Deputy Secretary, and the Special Trustee").

C. Contempt Specifications

The district court held Secretary Norton and Assistant Secretary McCaleb in "civil contempt of court" (1) for having engaged in "litigation misconduct," to wit, "failing to comply with the Court's Order of December 21, 1999," and (2-5) for having, in each of four ways, "committed a fraud on the Court." *Contempt Order,* 226 F.Supp.2d at 161. The Department claims the district court erred in two respects: by holding Norton and McCaleb in contempt (1) based upon conduct of their predecessors in office, and (2) without finding either officer had disobeyed a clear order of the court. The Department also argues the district court's factual findings do not support its conclusion that there was a fraud on the court. In response the plaintiffs argue the district court correctly applied the law to the facts. We agree with the Department, although our analysis is somewhat different.

1. Nature of the Contempt

A contempt proceeding is either civil or criminal by virtue of its "character and purpose," not by reason of the trial judge so denominating the proceeding. *Int'l Union, UMW v. Bagwell,* 512 U.S. 821, 827, 129 L. Ed. 2d 642, 114 S. Ct. 2552 (1994); *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441, 55 L. Ed. 797, 31 S. Ct. 492 (1911). Civil contempt is ordinarily used to compel compliance with an order of the court, *Bagwell,* 512 U.S. at 828, although in some circumstances a civil contempt sanction may be designed to "compensate[] the complainant for losses sustained." *Id.* at 829. By contrast, criminal contempt is used to punish, that is, to "vindicate the authority of the court" following a transgression rather than to compel future compliance or to aid the plaintiff. *Id.* at 828.

In this case the nature of the contempt is obscured by the lack of any clear sanction. Although it did, under the heading "Further Relief," expand the scope of the plaintiffs' discovery, *Contempt Opinion,* c226 F. Supp. 2d at 159, the district court itself noted that

> much of the relief granted is not dependent on the Court's conclusion that the defendants committed several frauds on the Court. Rather, the Court has fashioned much of the relief granted today (such as future proceedings and the appointment of a special master) simply because of the current status of trust reform.

Id. at 135. In fact, other than an award of expenses the plaintiffs incurred in the contempt trial, 226 F. Supp. 2d at 162 – which cannot be considered relief for the underlying contempt – the only relief granted that could conceivably be based upon the findings of contempt are the initiation of the Phase 1.5 proceeding and the appointment of the Special Master. On its face, that is, the *Contempt Order* appears to find the defendants in contempt, and then to impose no sanction.

Clearly, however, the district court did not intend its decision to be without effect. The exceedingly strong words it used in finding the defendants in contempt – in particular its statement that Secretary Norton was "unfit" – suggest the court intended the adjudication and accompanying opinion to serve as a reprimand to Secretary Norton and Assistant Secretary McCaleb. Indeed, the defendants reasonably characterize the decision as having "imposed opprobrium" upon them. Norton and McCaleb in particular believed the district court's adjudication to be so injurious to their reputations that they engaged private counsel and

sought to intervene as appellants and to present arguments in their respective personal capacities. We see no reason a district court may not impose a reprimand as the sole sanction for an adjudication of contempt, particularly when the contemnor is a public official acting in her official capacity.

Examining this sanction in light of the principles set forth in *Gompers* and *Bagwell,* therefore, it is clear the proceeding was, and should have been treated as being, for criminal contempt. In specifications two through five, the district court cites completed conduct of the defendants (or of their predecessors in office), making the proceeding criminal in nature. *Bagwell,* 512 U.S. at 829 ("When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect" and is therefore punitive in nature); *id.* at 828 (describing a sanction as criminal "if it is imposed retrospectively for a 'completed act of disobedience'" (quoting *Gompers,* 221 U.S. at 443)). Moreover, in each of those four specifications the district court held the defendants in contempt for "committing a fraud on the Court," *Contempt Opinion,* 226 F. Supp. 2d at 20, citing as authority a Supreme Court opinion assimilating fraud on the court to criminal rather than to civil contempt. *Id.* at 26 (citing *Pendergast v. United States,* 317 U.S. 412, 87 L. Ed. 368, 63 S. Ct. 268 (1943)). We have been unable to find any authority for, let alone any reason to believe, the proposition that fraud on the court constitutes a civil contempt. We therefore treat the district court's contempt citations on specifications two through five as criminal in nature.

We also note that, although the district court said in the *Contempt Opinion* it was not "issuing a contempt citation at this time with respect to Specification 1," *id.* at

118, the accompanying *Contempt Order* is ambiguous on this score and the court later interpreted it otherwise. The statement that the defendants had "engaged in litigation misconduct" appeared under the heading "Contempt Specifications." 226 F. Supp. 2d at 161. In a later opinion addressing a motion to disqualify the District Judge, Special Master-Monitor Kieffer, and another special master from participation in contempt proceedings against certain non-parties, the district court further muddied the waters, stating that on September 17 it indeed had held the defendants in contempt for, among other things, "engaging in litigation misconduct by failing to comply with the Court's Order" as described in specification one. *Memorandum and Order,* at 5-6 (Jan. 17, 2003). We therefore treat specification one as a finding of contempt, also criminal in nature.

Although one may be held in civil contempt for refusing to comply with a court order, a sanction for one's past failure to comply with an order is criminal in nature. *Bagwell,* 512 U.S. at 828-29; *Gompers,* 221 U.S. at 443-44. The district court clearly intended to punish the defendants for "failing to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project," *Contempt Order,* 226 F. Supp. 2d at 161, which is no doubt why its opinion lacks any suggestion that the defendants could yet comply and thereby purge themselves of the contempt. *See Bagwell,* 512 U.S. at 828 (contempt is civil if "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket").

The contempt proceeding being criminal rather than civil in nature, and the allegedly contumacious behavior occurring outside the presence of the court, the defendants

were entitled to the usual protections of the criminal law, such as trial by jury and proof beyond a reasonable doubt. *Id.* at 826-27. Because the Department has not objected upon any such procedural ground, however, and explicitly disavowed any such objection at oral argument, we treat the same as waived.

In addressing the merits of the contempt specifications, we start with the elementary principle that, subject to certain exceptions clearly not relevant here, and absent *respondeat superior* liability, one person cannot be held criminally liable for the conduct of another. We further note that a finding of criminal contempt "requires both a contemptuous act and a wrongful state of mind." *In re Farquhar,* 160 U.S. App. D.C. 295, 492 F.2d 561, 564 (D.C. Cir. 1973).*******

With these principles in mind, we can dispose quite readily of some of the district court's findings of contempt. Secretary Norton took office in January, Assistant Secretary McCaleb in July, 2001. Because specifications two and three concern conduct that took place prior to their taking office, the district court erred as a matter of law in holding either official in criminal contempt on those counts. The district court also erred in holding Assistant Secretary McCaleb in contempt on all five counts without having identified in the *Contempt Opinion* any specific act or

******* Although we have grave doubts about *respondeat superior* liability for a criminal contempt, we need not resolve them in this case. Even assuming it is permissible to hold a master in criminal contempt based in part upon the action of a servant, the discussion below makes clear that the requirements of *Farquhar,* quoted above, as well as general principles of contempt, preclude a finding of criminal contempt in this case.

omission whatsoever on his part. We address the other specifications of contempt, therefore, with reference to Secretary Norton alone.

2. Specification One

Specification one charged Secretary Norton with "failing to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project." *Contempt Opinion,* 226 F. Supp. 2d at 20. The district court said with regard to this specification that Secretary Norton had committed litigation misconduct, referring principally to its finding that "between December 21, 1999 and July 10, 2001" the Department had failed to take any steps toward completing an accounting. *Id.* at 113. The court characterized the Department's actions taken since that time as "too little, too late," and stated that "Interior cannot rely on efforts undertaken" at the "late date" of June, 2001 "to avoid a contempt citation." *Id.* at 115. In fact, the district court described its holding as being that "the defendants unreasonably delayed initiating the historical accounting project." *Id.* at 118.

Because Secretary Norton cannot be held criminally liable for contempt based upon the conduct of her predecessor in office, her contempt conviction cannot stand; she simply cannot be held criminally to account for any delay that occurred prior to her assuming office. Of the one and one-half year delay about which the district court was concerned, more than a year was on someone else's watch.

Moreover, the district court's findings clearly indicate that in her first six months in office Secretary Norton took significant steps toward completing an accounting. By June 2001 the Secretary had contracted with EDS, a

national consulting firm, to evaluate the status of the TAAMS project, *id.* at 86, and by November 2001 the Department had proposed a reorganization plan aimed at eliminating the problems EDS had identified. *Id.* at 45. In July 2001 Secretary Norton created the Office of Historical Trust Accounting, which has since made significant progress toward completing an accounting. *Id.* at 44-45. Hence, the Court Monitor stated in his Fifth Report, "there is no doubt the OHTA has made more progress . . . in six months [July through December, 2001] than the past administration did in six years."

These uncontested facts are inconsistent with a finding that Secretary Norton failed to comply with the district court's order of December 21, 1999. Therefore, we hold the district court erred as a matter of law in holding Secretary Norton in criminal contempt on specification one.

3. Specification Four

In specification four the Secretary was held in contempt for committing a fraud on the court. We note initially that fraud on the court is a narrow concept, limited to "the most egregious conduct involving a corruption of the judicial process itself." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2870, at 418 (2d ed. 1995).

The district court held Secretary Norton in contempt for "filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Cleanup." *Contempt Opinion,* 226 F. Supp. 2d at 124. Of those eight reports, however, the first four were filed prior to Secretary Norton's taking office, and she therefore

cannot be held criminally liable for anything in them. The remaining reports do not rise to the level of fraud on the court.

The court complained that the fifth report provided a "positive assessment" of the status of TAAMS "based on nothing more than speculation and wishful thinking." *Id.* at 80. Of the sixth report, the district court said the Department was "misleading" the court when it represented "it was moving ever closer to being able to implement fully the title and realty portions of TAAMS," and that it "had conducted specific tests that indicated that it was almost ready to deploy TAAMS." *Id.* at 82. Regarding the seventh report, the court noted the Department's concession that it had not met certain goals and complained that the Department "presented a positive picture of TAAMS despite the fact that the agency was not ready to deploy or implement the land management system as scheduled, and . . . clearly was not going to be able to deploy or implement it anytime soon." *Id.* at 83. The court also objected that "Interior did not provide the Court with anything close to what can be construed as a complete picture of the system's status." *Id.*

Finally, with regard to the eighth report – which was the first to be filed after Interior had received EDS's assessment of the project – the court noted both Secretary Norton's concession that previous reports had been inadequate, and the Secretary's attempts to improve the quality of the reports. *Id.* at 84-85. The district court appeared to have no quarrel with the content of the eighth report. Instead, the court inferred from admissions in the eighth report that the inadequacies of the previous reports were intentional and contumacious. *See id.* at 80 (completion dates in fifth report, "in light of the later filed quarterly

status reports, [were] based on nothing more than speculation and wishful thinking"); *id.* at 82 (sixth report "particularly misleading (and troubling) in light of the Department's Eighth Report"); *see also id.* at 84 (quoting Secretary Norton's testimony that seventh report gave "an insufficient picture" and was "not a particularly good document").

We find the reasoning of the district court mystifying. The court is surely correct in stating that the eighth report does not "absolve[] the defendants" of responsibility for any past wrongdoing. *Id.* at 126. But neither does the Secretary's candid critique of prior reports, made in the light shed by EDS's evaluation, lead to the conclusion that those reports were intentionally false and misleading; the district court's findings of fact simply do not support its conclusion that Secretary Norton committed a fraud on the court. To be sure, the earlier reports painted an overly sunny picture of the status of the TAAMS project and were misleading about the progress being made in ways painstakingly identified by the district court. The district court made no finding, however, that Secretary Norton had any personal knowledge that the fifth, sixth, or seventh reports were false or misleading.

In light of the above, we conclude that the district court erred as a matter of law in holding Secretary Norton in criminal contempt on specification four.

4. Specification Five

In specification five, the district court found the Secretary committed a fraud on the court by making false and misleading representations "regarding computer security of IIM trust data." *Id.* at 100. The Department

made representations on that subject under Secretary Norton in April and May 2001. The district court's findings as to those statements do not support its conclusion that Secretary Norton committed a fraud on the court.

The April representations appeared in the Department's Opposition to the Plaintiffs' Motion for Special Master Investigation; in particular, the court identified the statement that the Department had "made security a top priority and had taken numerous steps to improve the security of the Reston facility since the Special Master's visit," *id.* at 106, and the Department's outline of its completed and planned security improvements. *Id.* at 106-07. The district court also took issue with the Department's May 2001 Opposition to the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, insofar as the defendants argued the plaintiffs' "position [was] wholly without merit." *Id.* at 107.

The district court apparently found these statements to be false based upon the Report on IT Security prepared by a special master (not Kieffer), and upon "the Department's failure to dispute any of the underlying facts" set out in that report. *See id.* at 108. In the report, the special master had concluded the Department "has known about pervasive IT security deficiencies for more than a decade," *id.,* and found the Department "has not taken necessary actions to correct its numerous and longstanding IT security deficiencies," *id.* at 109, which the special master chronicled at length.

We see no finding of fact in the Report on IT Security, or in any opinion of the district court, that directly contradicts the statements in the Department's April Opposition, which the court identified as part of a fraud on the court.

Absent a direct contradiction, the facts of this case do not support the implicit inference that Secretary Norton "has acted with an intent to deceive or defraud the court." *United States v. Buck,* 281 F.3d 1336, 1342 (10th Cir. 2002). With respect to the statement in the Department's May Opposition, we think it inconceivable that a departmental secretary may be held to have committed a fraud on the court because an attorney representing her Department argued in an adversarial proceeding that an adversary's motion critical of the Department was "without merit."

We therefore conclude the district court erred as a matter of law in holding Secretary Norton in criminal contempt on specification five.

III. Conclusion

The *Contempt Order* is vacated insofar as it relates to the appointment and duties of the Special Master-Monitor. The *Special Master-Monitor Order* is vacated. The *Monitor Order*, denying the defendants' motion to revoke the appointment of Kieffer as Monitor, is vacated, and the district court is directed to enter an order granting that motion.

The *Contempt Order* is vacated insofar as it sanctions the defendants on specifications one through five and directs the payment of expenses and fees incurred by the plaintiffs. The case is remanded to the district court for further proceedings consistent with this opinion.

So ordered.

ELOUISE PEPION COBELL, et al., Plaintiffs, v. GALE A. NORTON, Secretary of the Interior, et al., Defendants.

Civil Action Number 96-1285 (RCL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

237 F. Supp. 2d 71; 2003 U.S. Dist. LEXIS 560

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Branch, Washington DC, USA. John J Siemietkowski, US Department of Justice Commercial Litigation Branch, Washington DC, USA. For Ingrid D Falanga, NON PARTY: Erik Lloyd Kitchen, Steptoe & Johnson, LLP, Washington DC, USA. For Timothy S Elliott, NON PARTY: Martha Purcell Rogers, Ober, Kaler, Grimes & Shriver, Washington DC, USA. For Edith R Blackwell, NON PARTY: Michael R Bromwich, Fried, Frank, Harris, Shriver & Jacobson, Washington DC, USA. Amy Berman Jackson, Trout & Richards, PLLC, Washington DC, USA. For Robert Lamb, NON PARTY: Roger Eric Zuckerman, Zuckerman Spaeder, LLP, Washington DC, USA. For James Douglas, NON PARTY: Kathleen Elizabeth Voelker, Washington DC, USA. For Dominic Nessl, NON PARTY: Stephen M Byers, Crowell & Moring, LLP, Washington DC, USA. For M Sharon Blackwell, NON PARTY, Michael R Bromwich, Fried, Frank Harris, Shriver & Jacobson, Washington DC, USA. For Hilda Manuel, NON PARTY: Leslie B Kiernan, Zuckerman Spaeder, LLP, Washington DC, USA. For Steven Swanson, NON PARTY: L Barrett Boss, Asbill, Moffitt & Boss, Chartered, Washington DC, USA. For John Berry, NON PARTY: Plato Cacheris, Baker & McKenzie, Washington DC, USA. John Francis Hundley, Baker & McKenzie, Washington DC, USA. Sydney Jean Hoffmann, The Law Offices of Plato Cacheris, Washington DC USA. For James A Eichner, NON PARTY: Barbara Ann Van Gelder, Wiley Rein & Fielding, LLP, Washington DC, USA. For Phillip A Brooks, NON PARTY: William Holt Briggs, Jr, Ross, Dixon & Bell, LLP, Washington DC, USA. Laura C Zimmitti, Ross, Dixon & Bell, LLP, Washington DC, USA. For John S Most, NON PARTY: Thomas Edward Wilson, Berliner, Corcoran & Rowe, LLP, Washington DC, USA. For Glenn Schumaker, NON PARTY: Plato Cacheris, Baker & McKenzie, Washington DC, USA. John Francis

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For Alan Lee Balaran, SPECIAL MASTER: Alan Lee Balaran, Washington DC, USA.

For Dow Jones & Company, Inc, MOVANT: Richard Lee CYS, Davis Wright Tremaine, Washington DC, USA. Jonathan K Tycko, Tycko Zavareei, LLP, Washington DC, USA. For Kenneth F Rossman, MOVANT: Christopher B Mead, London & Mead, Washington DC, USA.

Albert Lee Bynum, MOVANT, Pro se, Gadsden AL, USA.

For Albert Lee Bynum, MOVANT: Nathaniel Davis Owens, Sr, Anniston AL, USA. For Intertribal Monitoring Association for Indian Trust Funds, MOVANT: Jill Elise Grant, Washington DC, USA. For Native American Industrial Distributors, Inc, MOVANT: Neil James Ruther, Towson MD, USA.

JUDGES: Royce C. Lamberth, United States District Judge.

OPINION BY: Royce C. Lamberth

OPINION:

MEMORANDUM AND ORDER

This matter comes before the Court on thirteen separate motions to disqualify the presiding judge, Special Master Alan Balaran ("Master"), and Special Master-Monitor Joseph S. Kieffer, III ("Monitor") from participating in proceedings against 39 individuals, present or former employees of the United States government whose employment required them to participate in activities related to the individual Indian trust accounts at issue in the present action.[1] In the alternative, movants seek to

[1] Anne Shields' Motion for Recusal, or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1581-1, 1581-2], filed on October 29, 2002; Philip A. Brooks' Motion for Recusal, or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1582-1, 1582-2], filed on October 29, 2002; Motion for Recusal (Bruce Babbitt, John Leshy, Edward Cohen, and Edith Blackwell) [1583-1], filed on October 29, 2002 ["Babbitt Motion"]; Charles W. Findlay's Motion for Recusal, or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1645-1], filed on November 6, 2002; Michael Rossetti's Motion for Recusal or, in the Alternative, to Take Discovery Regarding Ex Parte Communications [1595-1], filed on November 6,

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take full discovery relating to alleged ex parte communications among the Master, the Monitor, other government employees, and the Court.[2] Because the motions and supporting memoranda are nearly identical in their factual statements and arguments, the Court will address all thirteen in this opinion.[3] Upon consideration of the

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2002; John S. Most's Motion for Recusal of Royce C. Lamberth or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1601-1], filed on November 8, 2002; Motion for Recusal, or in the Alternative, to Take Discovery Related to Ex Parte Communications (Michael Carr) [1646-1], filed on November 15, 2002; Tom Clark II's Motion for Limited Recusal [1665-1], filed on December 10, 2002; David Shuey's Motion for Recusal, or in the Alternative, For Leave to Take Discovery to Ex Parte Communications [1672-1], filed on December 11, 2002; Motion of Sarah Himmelhoch for Recusal, or, in the Alternative, for Discovery Relating to Ex Parte Communications [1675-1], filed on December 16, 2002; Motion of Kenneth F. Rossman for Recusal, or, in the Alternative, for Discovery Relating to Ex Parte Communications [1679-1], filed on December 18, 2002; Motion for Recusal and Disqualification or, in the Alternative, to Take Discovery Regarding Ex Parte Communications (Sabrina McCarthy) [1683-1], filed on December 20, 2002; and Steven Swanson's Motion for Recusal and Disqualification or, in the Alternative, to Take Discovery Regarding Ex Parte Communications [1689-1], filed on December 26, 2002 ["the Recusal Motions"].

[2] For the purposes of this Opinion, "ex parte communications" will refer to communications related to matters in dispute between a judge or a judicial agent (magistrate, special master, receiver, expert) and other persons – parties, non-parties, witnesses, etc. – without counsel for the parties present. In ordinary parlance, an ex parte communication is a "generally prohibited communication[] between counsel and the court when opposing counsel is not present." BLACK'S LAW DICTIONARY 597 (7th ed. 1999); cf. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 14.3.1, at 410 (1996) ("An ex parte contact is generally thought to be one between a person who is in a decision-making role and a person who is either a party or counsel to a proceeding before him that takes place without notice and outside the record.").

[3] In fact, because eleven of the Recusal Motions simply incorporate by reference the allegations set forth in the Babbitt Motion without providing additional substantive claims, the Court will focus its discussion on the Babbitt Motion. Only the Shuey Motion appears to

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Recusal Motions, plaintiffs' consolidated opposition brief, movants' reply briefs, the applicable law in this case, and the entire record herein, the Court finds the Recusal Motions to be without merit.[4]

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have added additional facts in support of its claims (which are addressed below), though it does not supplement these facts with any additional claims.

[4] Movants, significantly, do not seek to disqualify Master Balaran from participating in the underlying litigation. They request only that the Master be disqualified from any further proceedings regarding motions seeking civil and criminal contempt that the Court referred to him on September 17, 2002. *See* Babbitt Motion at 2 ("Absent recusal of the Court and disqualification of the Special Master and the Court Monitor from further proceedings involving these matters, the Movants will not be afforded these fundamental legal rights."); Shields Motion at 1-2 (seeking recusal "because extensive ex parte communications between the Court and the Special Master-Monitor have given Judge Lamberth 'personal knowledge of disputed evidentiary facts' concerning the substance of the Show Cause Proceedings that have been instituted against her"); Findlay Motion at 2 (seeking "recusal of this Court from the Order to Show Cause Proceedings against him, in his individual capacity"); Brooks Motion at 2 ("Because the Court has had extensive ex parte communications with Mr. Kieffer ... the Court has gained 'personal knowledge of disputed evidentiary facts concerning the proceeding," and recusal is warranted); Most Motion at 1 (requesting that "the Honorable Royce C. Lamberth recuse himself, and order the disqualification of Special Master-Monitor Joseph S. Kieffer III and Special Master Alan L. Balaran, from any and all proceedings regarding movant in his individual capacity"); Rossetti Motion at 1 (seeking "recusal of the Honorable Royce C. Lamberth over matters involving Mr. Rossetti in his individual capacity, including any proceedings preliminary to a Show Cause proceeding or any Show Cause proceedings as may be directed against him, either through this Honorable Court or through its appointed Special Master, Alan L. Balaran"); Carr Motion at 1 ("Because the Court, Special Master Balaran, and Special Master-Monitor Kieffer have engaged in extensive *ex parte* communications which affect their ability to function as neutral parties in determining whether Mr. Carr moves to recuse them from investigating or adjudicating any contempt proceedings raising from Plaintiffs' motion."); Clark Motion at 1 ("Tom C. Clark II brings this motion for the

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I. BACKGROUND

On February 22, 1999, this Court found defendants Secretary of the Interior Bruce Babbitt, Secretary of the Treasury Robert Rubin, and Department of the Interior Assistant Secretary, Indian Affairs Kevin Gover to be in civil contempt of the Court's discovery orders of November 27, 1996 and May 4, 1998. Two days later, in accordance with *Rule 53 of the Federal Rules of Civil Procedure* and with the consent of both parties, this Court appointed Alan Balaran to serve as a special master in this litigation. Special Master Balaran was ordered to "oversee the discovery process in this case to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure." Order dated February 24, 1999, at 2. To fulfill his duties, the Court endowed Special Master Balaran with the authority to "do all acts and take all measures necessary or proper for the efficient performance of the master's duties, as set forth in this order." *Id.*[5] With the consent of the parties, the Court subsequently expanded

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limited recusal of the Judicial Officers who preside over this case from taking part in any proceedings related to plaintiffs' motion for an order to show cause regarding contempt as to Mr. Clark."); Shuey Motion at 1 (seeking that "the Honorable Royce C. Lamberth recuse himself and order the disqualification of Special Master-Monitor Joseph S. Kieffer III and Special Master Alan L. Balaran, from any and all proceedings regarding movant in his individual capacity.").

[5] This language in the Balaran Order of Reference quotes directly the description of the powers granted to special masters appointed pursuant to Rule 53 and can be read to include the judicial gloss applied to those words that further define those powers, including the authority to engage in ex parte communications under certain circumstances. *See, e.g., Alberti v. Klevenhagen*, 660 F. Supp. 605, 610 (S.D. Tex. 1987); *Ruiz v. Estelle*, 679 F.2d 1115, 1170 (5th Cir. 1982); and *Thompson v. Enomoto*, 815 F.2d 1323, 1326 n.7 (9th Cir. 1987), discussed *infra*.

Mr. Balaran's order of reference to include oversight of "the Interior Department's retention and protection from destruction of IIM Records through, among other things, on-site visits to any location where IIM Records are not being protected from destruction or threatened destruction." Order dated August 12, 1999 at 2. On March 29, 2002, the Court clarified these orders of reference by holding that the Master could engage in ex parte communications in the discharge of his obligations. *See* Mem. and Order dated March 29, 2002 at 7-8 (noting that "courts have uniformly acknowledged the authority of institutional reform special masters to uncover facts and collect evidence via ex parte contacts with parties and counsel. . . . [and that] Interior has never objected to any of the Master's reports chronicling those visits and assessing the evidence accumulated therefrom.").

On April 16, 2001, with the consent of both parties, the Court appointed Joseph S. Kieffer, III, to serve as court monitor in this action. Mr. Kieffer was directed to "monitor and review all of the Interior defendants' trust reform activities and file written reports of his findings," which were to include "a summary of the defendants' trust reform progress and any other matter [he] deems pertinent to trust reform." Order dated April 16, 2001 at 2. Defendants were ordered to "facilitate and assist Mr. Kieffer in the execution of his duties and responsibilities" and to provide him with "access to any Interior offices or employees to gather information necessary or proper to fulfill his duties." *Id.* The Court explicitly authorized Mr. Kieffer to "make and receive ex parte communications with all entities necessary or proper to effectuate his duties." *Id.*

On November 28, 2001, the Court issued an order directing Secretary Norton and Assistant Secretary McCaleb to show cause why they should not be held in contempt (1) for failure "to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project"; (2) for "committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting during the period from March 2000 until January 2001"; (3) for "committing a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999"; and (4) for "committing a fraud on the Court by filing false and misleading quarterly reports starting in March 2000, regarding TAAMS and BIA Data Cleanup." Order dated November 28, 2001 at 2. On December 6, 2002, a fifth specification was added, ordering Secretary Norton and Assistant Secretary for Indian Affairs Neal McCaleb to show cause why they should not be held on contempt for "committing a fraud on the Court by making false and misleading representations starting in March 2000, regarding computer security of IIM trust data." Order dated Dec. 6, 2001 at 1.

The first four counts facing the Secretary and the Assistant Secretary were grounded in findings made by the Court Monitor in his reports, dated July 11, 2001 (Interior's statistical sampling project); August 9, 2001 (TAAMS); September 17, 2001 (the BIA Data Cleanup project); and October 16, 2001 (Interior's Seventh Quarterly Report). The fifth contempt count was premised upon the November 14, 2001 Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of the Interior.

On September 17, 2002, following a trial, the Court held both Secretary Norton and Assistant Secretary of Indian Affairs Neal McCaleb in contempt of court for "engaging in litigation misconduct by failing to comply with the Court's Order of December 21, 1999, to initiate a Historical Accounting Project. . . . Committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000, until January 2001. . . . Committing a fraud on the Court by failing to disclose the true status of the TAAMS subproject between September 1999 and December 21, 1999. . . . Committing a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Cleanup. . . . [and] committing a fraud on the Court by making false and misleading representations starting in March 2000, regarding computer security of IIM trust data." Order dated Sept. 17, 2002 at 1-2.

On the same date, the Court referred to the Master (1) plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court In Connection With Trial One, which had been filed on October 19, 2001, and (2) plaintiffs' Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail, which had been filed on March 20, 2002 (collectively, the "September 17 Referrals").[6]

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[6] The Babbitt Motion alludes to a third motion, plaintiffs' Mem. in Support of Mot. for Order to Show Cause Why Past and Present Interior Defendants and their Employees and Counsel Should Not Be

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In reference to the first motion, the Court directed the Master to "develop a complete record with respect to these 39 non-party individuals. . . . [and] upon completing his review of these matters, issue a report and recommendation regarding whether each individual should be ordered to show cause why he or she should not be held in (civil or criminal) contempt of court, or whether other sanctions are appropriate against such individuals." Mem. Op. dated Sept. 17, 2002 at 255. In reference to plaintiffs' March 2002 motion, the Court ordered "that the plaintiffs' motion for order to show cause why Interior defendants and their counsel should not be held in contempt for destroying e-mail . . . shall be referred to Special Master Balaran. Special Master Balaran shall issue a report and recommendation on the issues raised in the plaintiffs' motion." Order dated Sept. 17, 2002 at 4. This latter referral stemmed from the Master's report and recommendation wherein he found that "defendant had ignored its duty to retain and preserve backup tapes of e-mail messages responsive to the Third Formal Request for Production of Documents" and noted that it would be "impossible to assess the impact that defendant's spoilation may have had on Phase I trial issues or what it may have on future

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Held in Contempt, which was filed on August 27, 2001. *See* Babbitt Motion at 1 & n.1. On November 28, 2001, the Court granted that motion as to Interior defendants in their official capacities, but explained that it would defer any ruling on the motion as to non-party employees and counsel. *See* Order to Show Cause, dated Nov. 28, 2001, at 1. Having examined the remaining allegations in the August 27 motion, the Court has determined that they have been merged into and subsumed by plaintiffs' October 19, 2001 motion for an order to show cause. Accordingly, only the October 19, 2001 and March 20, 2002 motions have been referred to the Master.

proceedings which touch upon defendants' trust obligations. . . ." Op. dated July 27, 2001 at 17, 18.

These referrals prompted movants to file their respective motions for recusal. Those motions articulate movants' concern that the Master and Monitor have engaged in secret, off-the-record communications with employees and officials of the Interior Department as well as with the Court, the substance of which they are not aware. *See, e.g.,* Babbitt Motion at 7 ("Though the substance of the communications cannot be known with certainty, because they were not recorded, the sheer number of contacts and length of the contacts suggest the Court Monitor performed much of his work for this case ex parte and in secret."); Shuey Motion at 11 ("Special Master Balaran's invoices detail extensive substantive ex parte contacts that Special Master Balaran has engaged in with a wide range of entities and persons."). Movants assert that the Monitor's time records reference a number of meetings with employees and officials from the Interior Department, as well as meetings with the Court, and note that the Monitor's meetings with the Court have been acknowledged by the Court. Movants also point to the invoices of the Master reflecting time expended during meetings with the Court, with Special Trustee Tom Slonaker, with the former Chief Information Officer for the Bureau of Indian Affairs, and with a number of former Interior Department employees.

Beyond demanding the recusal of the Master and Monitor from any and all proceedings concerning the September 17 referrals, movants urge the Court to recuse itself from these proceedings pursuant to 28 U.S.C. §§ 455(a) and

(b)(1).[7] Movants argue that although the communications between the Court and its special masters were "not improper in the context of the underlying litigation," for the purposes of the underlying contempt proceedings, the Master and the Monitor "furnished the Court with extra-judicial knowledge" about the current litigation, mandating the recusal of all three. Babbitt Motion at 18. In the alternative, movants seek to conduct discovery upon the Master and Monitor to ascertain the substance of these communications.

As demonstrated below, movants' attempt to recuse the Master, the Monitor and this Court from officiating in the September 17 referrals on the basis of alleged ex parte communications is without merit. Movants have misconstrued the scope of Court's referral of the contempt allegations to the Master, misapplied the legal standards in this jurisdiction and misstated the facts concerning the nature of the contacts among the Master, Interior employees, the Monitor, and the Court. As further discussed below, the Master and Monitor have conducted their activities and acquitted their responsibilities well within applicable legal and ethical bounds. They have neither received nor used ex parte communications in a manner that would undermine the ability of the Master to investigate the underlying allegations in an unbiased manner or the ability of the Court to render a fair adjudication. In other words,

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[7] 28 U.S.C. § 455(a) provides that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(b)(1) provides that a justice, judge or magistrate judge shall disqualify himself where "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

movants have failed to meet their burden for disqualifying the Master, the Monitor, or this Court in conjunction with the contempt allegations raised by plaintiffs.

II. MOTION TO DISQUALIFY THE SPECIAL MASTER

A. Standard of Review

The discretion of this Court in considering the sufficiency of a motion to remove a judicial officer pursuant to 28 U.S.C. § 455(a) is broad. *See James v. District of Columbia*, 91 F. Supp. 2d 1, 44, 46-47 (D.D.C. 2002). Under federal law, a judge may be disqualified in two situations that are relevant to the instant motions: (1) where his or her "impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and (2) where he or she possesses "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). Whereas section 455(a) "sets out an objective standard for recusal, creating the so-called 'appearance of justice' rule," *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 428 (2d Cir.1988) (citation omitted), section 455(b)(1) has been interpreted to mean any "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

In confronting a challenge under either provision, the Court must begin its analysis of the allegations supporting such a request with a presumption against disqualification. *See Tripp v. Executive Office of the President*, 104

F. Supp. 2d 30, 34 (D.D.C. 2000) ("Judges are presumed to be impartial."); *McCann v. Communications Design Corp*, 775 F. Supp. 1506, 1522 (D. Conn. 1991) ("The judge to whom a recusal motion is addressed is presumed to be impartial."). To overcome that presumption, movants must demonstrate by clear and convincing evidence that the Master has conducted himself in a manner supporting his disqualification. *See Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 634 (5th Cir. 1971) (clarifying that a party must produce clear and convincing evidence that a judge should be disqualified pursuant to section 455); *cf. C & W Fish Co. v. Fox*, 289 U.S. App. D.C. 323, 931 F.2d 1556, 1564-65 (D.C. Cir.1991) (declaring that an agency administrator should be disqualified from rulemaking on account of prejudice only upon a "clear and convincing showing" of an "unalterably closed mind on matters critical to the disposition of the proceeding").

B. The Nature of the Court's September 17, 2002 Referral of the Contempt Allegations to the Special Master

On September 17, 2002, the Court directed the Master to "develop a complete record with respect to these 39 non-party individuals. . . . [and] upon completing his review of these matters, issue a report and recommendation regarding whether each individual should be ordered to show cause why he or she should not be held in (civil or criminal) contempt of court, or whether other sanctions are appropriate against such individuals." Mem. Op. dated September 17, 2002 at 255. The Court further directed the Master to investigate the destruction of e-mail backup tapes and to file a report and recommendation with the Court. Order dated September 17, 2002 at 4.

In so doing, the Court instructed the Master to review the allegations lodged by plaintiffs in their show cause motions dated October 19, 2001 and March 20, 2002, and to file a report and recommendation after investigating those claims. The Court did not ask the Master to adjudicate any of the issues raised in plaintiffs' contempt motions, and did not bestow on the Master any authority to render any decision as to whether contempt should lie. Rather, the Court directed the Master to assess whether the thirty-nine individuals had violated the Court's orders: (1) to retain trust records in the form of e-mail backup tapes and (2) to report candidly to the Court concerning the progress of trust reform initiatives. This direction was not without precedent: the Court had previously ordered the Master to assess whether the Interior Department was complying with its order to retain and protect IIM Records from destruction. *See* Order dated August 12, 1999 at 2. As discussed below, it is a permissible – indeed, necessary – function of special masters to conduct these types of investigations in order to ensure that defendants follow judicial directives, and it is expected that masters will engage in ex parte contacts in the course of such investigations. The September 17 Referrals to Special Master Balaran are no different.

C. Analysis

Movants maintain that Special Master Balaran must be disqualified from performing his investigatory functions pursuant to the September 17 Referrals because he occupies a position "functionally indistinguishable from that of a judge" and, as such, is proscribed from adjudicating matters regarding which he has been privy to information obtained outside the presence of counsel. Although movants'

arguments seem compelling at first glance, they are incorrect as a matter of fact and as a matter of law.

1. An Institutional Master May Engage in Ex Parte Communications in the Discharge of His Obligations

The original Order of Reference appointing the Master provided that "the special master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties, as set forth in this order." Order dated February 24, 1999 at 2 (emphasis added). On August 12, 1999, the Court signed a consent order drafted by both parties that authorized the Master "to oversee the Interior Department's retention and protection from destruction of IIM Records through, among other things, on-site visits to any location where IIM Records are not being protected from destruction or threatened destruction, he may recommend to the Department that it take reasonable steps to protect IIM Records found to be in jeopardy of destruction. He may also recommend to the Court such remedial action as he deems appropriate pursuant to *Rule 53, Federal Rules of Civil Procedure.*" Order dated August 12, 1999 Order at 2. While the initial order of reference was designed to appoint a special master for the dual purpose of resolving discovery disputes and ensuring compliance with the Court's discovery orders in this regard,[8] the August 12 Order focused more specifically on "the need for

[8] *See* MANUAL FOR COMPLEX LITIGATION § 21.424 (3d ed. 1995) (explaining that "special masters have been successfully used to oversee discovery").

[a] special master[] . . . in the context of institutional reform litigation, specifically during its remedial states, i.e., efforts to mend constitutional and statutory defects in the structures and practices of [an] institution[]." Special Project, The Remedial Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784, 788 (1978). It is well established that in such instances, "special masters play an essential role, providing a judicial presence at the institution while freeing the judge to attend to other matters." Note, Rule 53, Inherent Powers, and Institutional Reform, 66 N.Y.U. L. REV. 800, 820 (1991). *See also Ruiz v. Estelle*, 503 F. Supp. 1265, 1389 (S.D. Tex. 1980) ("Supervision and monitoring of the defendants' effectuation of the decree to be entered in this civil action will require the appointment of one or more special masters. . . . [because] the court does not have the resources necessary effectively to superintend the day-to-day details of the execution of the program to be set out in the decree."), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982).

Although *Rule 53(d)(1) of the Federal Rules of Civil Procedure* permits a special master to proceed ex parte only where necessary to provide notice when "a party fails to appear at the time and place appointed," courts have acknowledged the need for special masters serving in cases involving institutional reform to engage in ex parte contacts with both parties and counsel. *See, e.g., Alberti v. Klevenhagen*, 660 F. Supp. 605, 609 (S.D. Tex. 1987) (authorizing "communications with counsel for the parties from time to time in his discretion (including ex parte) concerning any matters as to which the Fact Finding Special Master deems such communications to be appropriate in understanding the issues and performing his

duties as a Master."). In the instant case, defendants contemplated that such off-the-record communications would take place. *See* July 12, 2000 Mem. to Bureau of Indian Affairs Employees from Assistant Secretary for Indian Affairs Kevin Gover ("Please admit Mr. Balaran to all areas within your control that contain IIM records and provide him with all necessary cooperation and courtesy attendant to the exercise of his authority under the Court's orders."); March 2, 2001 Mem. from Deputy Commissioner of Indian Affairs Sharon Blackwell (same); *see also* February 23, 2001 Letter from Richard L. Gregg, Commissioner, Financial Management Service and Van Zeck, Commissioner, Bureau of Public Debt to All Federal Reserve Banks and Branches (requesting that "senior Bank or Branch records officers meet with Special Master Balaran and any officials accompanying him and extend to him and those with him every courtesy").

It has also been a long-established practice for special masters to conduct confidential interviews in the course of their capacity of ensuring compliance with the court's decrees. *See Thompson v. Enomoto*, 815 F.2d 1323, 1326 n.7 (9th Cir. 1987) (permitting the special master to "interview, on a confidential basis or otherwise, any person, including any correctional staff member or inmate, affected by the Consent Decree"); *National Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 539 (9th Cir. 1987) (authorizing the special master to "interview, on a confidential basis or otherwise, any CAMP director, supervisor, or team member, or any person assisting in the implementation of the CAMP program"); *Ruiz v. Estelle*, 679 F.2d 1115, 1170 ("The Special Master may conduct confidential interviews and meetings at the institution to which they are confined with any prisoner or group of

prisoners under the jurisdiction of the Texas Department of Corrections."), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 741 (6th Cir. 1979) (granting the special master "free access" to all employees and staff of defendant school boards); *Alberti*, 660 F. Supp. at 610 (authorizing the special master "to conduct unimpeded confidential interviews with any County employee possessing relevant information, any member of the Sheriff's staff or any inmate. They shall have the unrestricted right to tape-record any interview, and shall have the right to attend any institutional meetings or proceedings . . ."); *Young v. Pierce*, 640 F. Supp. 1476, 1489 (E.D. Tex. 1986) (noting that the special master had been granted plenary authority to interview employees and staff of defendant federal agency), vacated on other grounds, 822 F.2d 1368 (5th Cir. 1987); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1420 (N.D. Cal. 1984) (authorizing the special master to interview confidentially anyone affected by the court's permanent injunction, including correctional staff members and inmates), affd' in part, revd' in part, vacated in part, 801 F.2d 1080 (9th Cir. 1986). Perhaps the most cogent explanation of the need for these off-the-record communications was provided by Chief Judge Posner who, in responding to a challenge of "procedural irregularities, in particular the fact that the master engaged in ex parte communications with the plaintiff's lawyers," explained: "the reason is practical, and is connected once again with the managerial character of institutional reform litigation in the remedial phase. The master is not a judge, and the judicializing of his role would slow him down and thus further protract

this litigation, already in its tenth year." *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 171 F.3d 1083, 1088 (7th Cir. 1999).[9] In accordance with these prerogatives – and with the Interior Department's explicit acknowledgment of the Master's authority to conduct unsupervised visits to all locations within the control of the Department of the Interior which house trust data – the Master has engaged in numerous ex parte confidential interviews with Interior and Treasury Department employees.

Any concern expressed by movants that the Master's ex parte contacts might affect his ability to fairly adjudicate the issues raised by the September 17 Referrals is therefore nonsensical. Their arguments misconstrue the very nature of the Court's September 17 Referrals, which are manifestly not directives to adjudicate, or to render decisions upon, the ultimate issues involved. Instead, these referrals issued for the same reason that the judges in the above-mentioned cases, recognizing the need to utilize the services of special masters to monitor compliance with their orders, issued similar referrals. The sheer volume of the issues raised by plaintiffs necessitate that plaintiffs file bills of particulars and that a trusted special master be dispatched to report on whether movants have complied with the orders that led to the contempt findings against the Secretary of the Interior and the Assistant Secretary for Indian Affairs, and whether they have violated its orders to preserve and retain individual Indian trust data.

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[9] It is worth noting that Chief Judge Posner estopped the defendant from objecting to such ex parte contacts. *Id.*

B. A Special Master Is Functionally Distinguishable From a Judge in Several Critical Aspects.

An assignment to investigate compliance with judicial directives does not automatically vest a special master with the authority of an Article III judge. For although Article III judges may render dispositions on contested substantive issues, the ability to make such determinations lies beyond the authority that may properly be referred to special masters. *Ass'n In re Bituminous Coal Operators' Inc.*, 949 F.2d 1165, 1169 (D.C. Cir. 1991) ("It is the function of the district judge, in a non-jury civil case, to decide dispositive issues of fact and law genuinely disputed by the parties. The judge may not impose on the parties, over the objection of at least one of them, a magistrate or master as 'a surrogate judge' to try the controversy and determine liability."); *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987) (finding that the "reference of dispositive motions to the special master will deprive the parties of their right to have the basic issues heard by a district judge").

However, in the instant proceedings, the Master has not been asked to decide whether a finding of civil or criminal contempt should lie. Nor has he been directed to resolve any dispute central to the merits of the underlying litigation. Instead, the Master has been charged with (1) investigating whether officials of the Interior Department, and their counsel, violated Court orders and (2) issuing a report and recommendation that sets forth his findings as to whether there is sufficient evidence that would merit further oral or evidentiary hearings on plaintiffs' motions. The Master's ability to make use of ex parte contacts in performing these functions cannot

rationally be disputed, given that the use of such contacts has been explicitly recognized by virtually all circuits,[10] by the Federal Judicial Center,[11] by the parties[12] and by

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[10] *See* cases cited *supra* section II.C.1.

[11] *See* Willging, Hooper, Leary, Miletich, Reagan & Shapard, Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters 8 (2000), available at http://www.uscourts.gov/rules/newrules10.html:

> In general, we found that the nature of the special master appointment determined whether ex parte communication was permitted. For example, judges typically permitted ex parte communication directed toward administrative, procedural, and settlement matters. Whether the appointment occurred at pretrial, trial or posttrial states also played a role in whether a judge allowed ex parte communications. For example, posttrial masters appointed to monitor compliance with an order almost always were expressly allowed, even instructed, to communicate ex parte with the parties.

[12] *See* discussion *supra* section II.C.1. Incidentally, movants have objected that they never consented to the Court's authorization to allow the Master and Monitor to engage in ex parte communications. *See, e.g.*, Babbitt Motion at 5 ("None of the movants was a party to the Cobell litigation in any capacity at the time of [the Monitor's] appointment, and they never consented to his appointment and never agreed that he would be permitted to conduct ex parte meetings with witnesses . . ."); Brooks Motion at 2-3 ("Notwithstanding any agreement by the government to ex parte communications involving Mr. Kieffer, there has been no agreement regarding ex parte communications by, or on behalf of, Mr. Brooks, in his individual capacity."). It would seem, then, that movants believe that the justification for the special masters' authority to engage in ex parte communications rests upon the consent of the parties to their appointment. This is incorrect. Although defendants' consent to their appointment does lends additional weight to their authority, that authority does not depend on the good graces of defendants. If it did, defendants would be able to revoke their appointment at will, which would be absurd. Rather, the special masters are authorized to engage in ex parte communications with third parties because their appointment orders provide them with such authority. Accordingly, it is irrelevant whether or not movants ever gave their

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movants themselves.[13] Given movants' acceptance of the Master's ex parte communications during his investigation of defendants' compliance with the Court's proscription against destroying trust records, their objections to his utilizing such communications in the current proceedings makes little sense. These objections are further undermined by the well-established rule that, to the extent that a special master's report relies upon information obtained from one-sided communications, it cannot be accorded the same level of deference as reports based upon evidence received during a more formalized proceeding. *See, e.g., Mullen*, 828 F.2d at 539 ("The Monitor shall not base any findings or legal conclusions in any subsequent contempt hearing on statements received . . . informally from citizens and witnesses."); *Ruiz*, 679 F.2d at 1162-63 (modifying an order permitting the special master to submit reports based on his own observations and investigations without a formal hearing, to provide that such reports would not be entitled to a presumption of correctness); *Young v. Pierce*, 640 F. Supp. at 1478 (stating that the "clearly erroneous" standard applied only to findings of the special master that were based on hearings conducted on the record after notice to the parties); *Lelsz v. Kavanagh*, 112 F.R.D. 367, 370 (N.D. Tex. 1986) (same).

The Court has expressly permitted the Special Master to engage in ex parte communications in the course of his

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consent, or presently give their consent, to the special masters to engage in ex parte communications.

[13] *See, e.g.*, Babbitt Motion at 2 (acknowledging that ex parte communications by the Special Master "may have been helpful or even necessary to the conduct of the underlying litigation."); *cf.* Clark Motion at 3 ("Mr. Clark expresses no position here regarding the propriety of these [ex parte] procedures in the litigation on the merits.").

various assignments, and there is nothing in the September 17 Referrals that proscribes such contacts in the course of his investigation of the matters referred to him. Additionally, although nothing in the record even suggests that any off-the-record contacts that the Master may have engaged in bore any relationship to the issues germane to the September 17 Referrals, nevertheless, out of an abundance of caution, the Court will not apply a "clearly erroneous" standard to any recommendations that might issue from those referrals.[14]

The Court notes, however, that movants' reliance on *Jenkins v. Sterlacci*, 270 U.S. App. D.C. 296, 849 F.2d 627 (D.C. Cir. 1988), for the proposition that Special Master Balaran occupies a position commensurate with the Court, and therefore merits disqualification because of his unrecorded communications, is not well taken. In Jenkins, the D.C. Circuit was asked to decide "whether the district

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[14] Rule 53(e)(2) of the Federal Rules of Civil Procedure provides that in non-jury actions, a master's factual findings become the judge's findings unless they are clearly erroneous. Additionally, when a special master makes findings of fact based on an evidentiary hearing convened pursuant to Rule 53(d), the judge may apply the "clearly erroneous" standard to such findings. *See Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097 (3d Cir. 1987) ("Under Rule 53(e)(2), a district court must accept a special master's proposed findings of fact unless clearly erroneous."). Under Rule 53(e)(1), the master must file a report with the clerk of the court setting out findings of fact and conclusions of law and must serve notice of the report on all parties. Unless instructed otherwise, the master must file with the report a transcript of the proceedings and of the evidence and the original exhibits, so that the court can review the evidence and decide whether the master's findings must be sustained as not clearly erroneous. *See Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch*, 80 F.3d 895, 905 (4th Cir. 1996). Under Rule 53(e)(4), the weight afforded a master's findings is the same regardless of whether the parties have consented to his appointment.

court properly denied appellant's motion to disqualify a special master who, while preparing a report in this case, represented a client in an unrelated proceeding in which a member of the law firm representing appellant served as opposing counsel." *Id.* at 628-29. After examining the issues of apparent impropriety, waiver, and bias, the court upheld the trial court's decision. Underlying the court's analysis, however, was its acknowledgment that, in the case before it, the special master "performed a role functionally indistinguishable from that of a judge." *Id.* at 634.

Movants' attempt to graft the holding in Jenkins onto the facts of the instant situation bears no fruit. Their argument that for the purposes of a disqualification motion, the Master should be held to the same standard as an Article III judge overlooks the fact that in Jenkins, the court's equating of masters with judges turned critically on whether the district court would be reviewing the master's findings only for "clear error." The D.C. Circuit explicitly stated that its decision to equate the two judicial officials was rooted in its determination that

> the special master's factual findings on these issues were reviewed by the district court only for "clear error," as required by *Rule 53(e)(2) of the Federal Rules of Civil Procedure.* In the face of conflicting evidence, the 'clear error' standard insulates a special master's findings from reversal by the district court unless that court is left with the definite and firm conviction that a mistake has been committed.

Jenkins, 849 F.2d at 631 (citations and internal quotation marks omitted).

Indeed, by expressly distinguishing the First Circuit's holding in *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir.

1976), that masters should not be held to the strict standards of impartiality that are applied to judges, the Jenkins court took pains to clarify that "at least insofar as special masters perform duties functionally equivalent to those performed by a judge, they must be held to the same standards as judges for purposes of disqualification." *Jenkins*, 849 F.2d at 631 n.1 (emphasis added). And the litmus test by which special masters are construed to be the "functional equivalent" of judges is the "clearly erroneous" standard of deference. It is only on the basis of such deference that a functional comparison between the two positions is appropriate, requiring a strict proscription against off-the-record communications such as those enunciated in and 3C(1)(a) of the Code of Judicial Conduct for United States Judges.[15]

Such concerns are of no moment here. Despite the fact that the Master's two reports that formed the basis for two of the September 17 Referrals were founded upon information subjected to formal process, and although the Master has implemented a set of procedures that prohibit ex parte communications in the underlying contempt investigation,[16] the Court, out of an abundance of caution, will not

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[15] Canon 3A(4) provides, in relevant part, that "[a] judge should . . . except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Canon 3C(1)(a) mandates that a judge recuse himself where his "impartiality might reasonably be questioned" because of "personal knowledge of disputed evidentiary facts concerning the proceedings."

[16] *See* October 7, 2002 Memorandum from Special Master to Counsel, at 6 ("All communications with the Special Master shall be in writing and directed to the Law Offices of Alan L. Balaran, 1717 Pennsylvania Ave., N.W., Suite 1200, Washington, DC 20006. All

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afford any findings made by the Master in this investigation the benefit of clearly erroneous" deference. The tasks of the Master will be to investigate the issues raised in plaintiffs' bills of particulars; to take sworn, transcribed deposition testimony of material witnesses with counsel present; and to identify relevant documents produced in the litigation. The aim of all these tasks is to refine and explicate the issues involved for consideration by the Court. In his report to the Court, the Master will state whether or not there are sufficient grounds for plaintiffs' motions to show cause that would merit further proceedings by this Court in the form of oral or evidentiary hearings on the motions. Following the filing of the Master's report with the Court will be a ten-day comment period during which objections and other recommendations may be made. And in accordance with the principles articulated in Young v. Pierce and Lelsz v. Kavanagh, cited above, in any objections to the report, movants may seek both factual and legal review de novo.

3. The Facts of the Instant Case Do Not Warrant Disqualification of the Special Master.

The Court notes, however, that even if Special Master Balaran had been directed to make findings of fact entitled to "clearly erroneous" review, and were therefore subject to ethical standards governing judges, the facts in this case do not warrant disqualification under the standards articulated in Jenkins. The court in Jenkins found that the

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correspondence shall be copied to counsel for the plaintiffs and the Named Individuals (both private and official.").

appellant had failed to offer substantial evidence of extra-judicial conduct inconsistent with the master's responsibilities as an impartial decision-maker to support an allegation of actual bias. *Id.* at 634-35. The same is true here. The essence of movants' claim against the Master is that the Master engaged in secret communications with potential witnesses without counsel present; that these ex parte communications (admittedly proper at the time, and consented to by the parties) were the basis of his reports to the Court; that plaintiffs based their motions to show cause on the Master's reports; and that the Master is presently directed to recommend whether or not the Court should grant plaintiffs' motions. Each of these individual points is mistaken. First, the Master has not been directed to decide plaintiffs' motions to show cause. Although he has been directed by this Court to report upon his investigation of issues raised by these motions, he is only being asked to report whether there are sufficient grounds to the allegations raised therein that would merit further oral or evidentiary hearings on the motions. Additionally, as noted above, the Master's findings will not be subject to "clearly erroneous" deference. Second, the two reports by the Master upon which two of the six September 17 Referrals were grounded were not based on ex parte communications. Instead, they were based on documents produced during discovery and on transcripts of sworn testimony taken with counsel present; moreover, the reports disclosed the sources of information on which they were based. Third, the reports and their accompanying documentation were not secret in any way, but were filed with the Court and provided to the parties for review and comment.

The Master issued two reports that ultimately formed the basis of two of the September 17 Referrals. One was the November 14, 2001 Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of the Interior ("IT Security Report"), in which the Master exposed the flaws in the Interior Department's computer systems that undermined the security of individual Indian trust data. The second was the July 27, 2001 Opinion responding to Defendant Department of the Interior's Motion for a Protective Order Clarifying Duty to Produce E-Mail Records ("E-Mail Report"). A review of these reports demonstrates that neither was based on ex parte or confidential communications.

Following the filing of the IT Security Report, defendants filed their Response to Plaintiffs' Renewed Motion for Temporary Restraining Order as Amended, arguing, inter alia, that the findings of the Master in the IT Security Report did not merit Rule 53 deference because they were founded upon improper one-sided communications. On December 12, 2001, the Master filed a Supplemental Report of the Special Master Regarding the Security of Trust Data at the Department of the Interior ("Supplemental Report"), outlining both the painstaking process that he undertook in arriving at his conclusions, and the manner in which government officials and contractors were interviewed and in which documents were compiled. The Supplemental Report demonstrated that the Special Master's findings were grounded in a formalized process that enabled all parties to participate in the review of all the relevant documents and all interviewed personnel. The Supplemental Report was never appealed. Moreover, as this Court has noted, defendants "conceded that 'the

Supplemental Report and the provision of the documents which the Special Master consulted address, for purposes of the Special Master's Report, the Interior Defendants' arguments noted above.'" *Cobell v. Norton*, 205 F.R.D. 52, 55 (D.D.C. 2002) (citing Interior's Response to Supplemental Report of the Special Master Regarding the Security of Trust Data at the Department of the Interior, dated December 31, 2001, at 2).

Similarly, a review of the E-Mail Report compels the conclusion that it too was organized without the benefit of any undisclosed communications. In that report, the Master was confronted with defendants' request for clarification of his May 11, 1999 order requiring them to search e-mail backup tapes for documents responsive to plaintiffs' Third Formal Request for Production of Documents. E-Mail Report at 1-2. The Master's decision – again unopposed – was that Interior was obligated to backup, restore, search, and produce information contained on its e-mail tapes, and to retain those tapes in addition to any printouts of the communications therein. E-Mail Report, passim. In addition to the legal analysis, the Master found that

> notwithstanding existing requests for discovery and repeated court orders denying Interior's attempts to block backup tape retention, search and production, the Office of the Solicitor engaged in a pattern of overwriting (and thus destroying the data embedded in) e-mail backup tapes generated at: (1) the main headquarters in Washington, D.C. as well as in its 18 field and regional offices between June 1998 and November 1998; (2) 17 field and regional offices between November 1998 and May 1999; and (3) 11 field

> and regional offices between May 1999 and November 20, 2000.

E-Mail Report at 16.

It was this finding that prompted plaintiffs' March 20, 2002 Motion for Order to Show Cause. *See* March 20 Motion for Order to Show Cause at 4. Here too, however, the Master was painstakingly explicit about disclosing the sources that led to his conclusion. These sources included the November 20, 1998 Declaration of Glenn Schumaker, Management Information Systems Team Leader for the Office of the Solicitor; a December 5, 2000 letter from the Office of Solicitor Attorney Edith Blackwell to Department of Justice Associate Chief Charles Findlay; a memorandum generated by then-Deputy Solicitor Edward B. Cohen to Glenn Schumaker, Nancy Jemison, and Estle Lewis; and the April 12, April 19, June 22, and October 18, 2000 letters from Justice Department Assistant Chief Charles Findlay revealing the fact that backup tapes had been overwritten. None of the information captured in the E-Mail Report even remotely suggests that it was gleaned from unmentioned sources – much less from ex parte communications.[17] In short, any honest reader of the Supplemental IT Security Report and the E-Mail Report would certainly not conclude that the information contained in these reports

[17] At least with respect to these two September 17 Referral counts, there is no appearance of partiality concerning communications that at least three movants concede "may have been helpful or even necessary to the conduct of the underlying litigation." Babbitt Motion at 2. The three movants who filed the Babbitt Motion do not argue that the Master did anything but conduct his investigations as directed, submit reports to which the parties did not object, and publicly disclose the methodology he employed to gather information.

had been derived from confidential sources or from ex parte communications.

As for the reports of the Monitor that led to the filing of the remaining four September 17 Referral counts, these were matters referred solely to the Monitor for investigation, not to the Master. The Master and the Monitor have never conferred privately about any of the respective matters that the Court has referred to them. Additionally, there is no overlap between the subject matter of the Monitor's reports and the Master's reports that would give rise to any inference that any such communications took place.[18]

In sum, the Court assigned to Special Master Balaran the duty to investigate and report on whether the thirty-nine individuals violated the Court's orders. These powers, like other investigatory powers, are not "duties functionally equivalent to those performed by a judge." Accordingly, the Jenkins standard that compels the disqualification of judges as final adjudicators does not apply to special masters who are not undertaking judicial functions, i.e., rendering determinative findings entitled to a "clearly erroneous" level of deference. And as stated above, to the extent that the Master has engaged in any ex parte communications, any findings based on such communications will not be subject to a "clearly erroneous" standard; instead, they

[18] To the extent that movants suggest that the Monitor recuse himself from any of these contempt proceedings, this is a non-issue insofar as the Court has made no such referral nor anticipates that the Monitor will have any such dealings. Accordingly, the only basis for disqualification of the Monitor relates to his supposedly improper communications with this Court. This matter is fully resolved in the following section.

will be considered by the Court together with other factors in deciding whether and how to proceed.[19]

II. MOTION TO RECUSE

In addition to seeking disqualification of the Master, movants lodge an additional, more serious charge against this Court: that the Master and Monitor "conducted

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[19] Neither of the two matters discussed in the recusal motion filed by David Shuey affect the Court's conclusion that the Master should not be disqualified. The Shuey Motion first asserts that a letter from the Master to Phillip Brooks dated January 31, 2001 relating to the destruction of documents at the Northern Cheyenne office of the Bureau of Indian Affairs mandates the Master's disqualification. Shuey Motion at 12-15. However, the letter has nothing to do with any of the issues underlying the September 17 Referrals. In the letter, the Master stated that during his interviews with employees of the Office of Trust Records, at least one employee had "described a palpable fear that s/he would be retaliated against for reporting management's failure to publish site-visit reports that described less [than] ideal conditions." Shuey Motion. Exh. 1. The Master also noted that he had learned that government counsel had "publicly called into question my ability to read, . . . likened my investigation to those undertaken by television characters [and] insisted that I have never practiced law." *Id.* Neither of these two points has anything to do with the issue of whether any of the thirty-nine named individuals committed a fraud upon the Court meriting a finding of civil or criminal contempt. The Shuey Motion also claims that Mr. Shuey "has no way of ascertaining what was said by then Special Trustee Slonaker and Deputy Special Trustee Thompson to Special Master Balaran" during the sealed depositions conducted by the Master of these two individuals. Shuey Motion at 16. First, the Court notes that the subject of these depositions had nothing to do with the allegations against Mr. Shuey. Rather, the thrust of the Special Master's investigation centered around the conduct of the Trust Management Improvement Project (TMIP) steering committee, which had nothing to do with Mr. Shuey. Second, all that Mr. Shuey need do to obtain access to the deposition testimony is sign a protective order, which he is welcome to do. At least thirty-five attorneys and support staff, including movant Phillip Brooks, have already signed such an order.

substantial, secret ex parte interviews of witnesses and other third parties about matters that lie at the heart of the contested factual issues raised by the pending motions and that they communicated [these] findings in repeated ex parte meetings with the Court." Babbitt Motion at 3-4. On the basis of this allegation, movants seek recusal of this Court under 28 U.S.C. § 455. As explained below, movants have completely misconstrued the nature of the contacts between the Master, the Monitor, and this Court. Because these contacts were neither improper nor unethical, they do not furnish grounds for recusal.

As explained above,[20] and as conceded by movants, it is perfectly appropriate for the Master and Monitor to conduct off-the-record interviews with government employees in the discharge of their obligations. But movants have mounted an additional charge: that the Master and Monitor tainted the Court by imparting information related to the instant proceedings that they had gained through those interviews during their meetings with the Court. The problem with movants' assertion is that neither the Master nor the Monitor actually revealed to the Court any such information. Movants' conclusion that they did is based on unwarranted inferences drawn from two sources of information. First, movants point to the unremarkable fact that the time records of the Master and Monitor demonstrate that both officials have met on various occasions with this Court. Second, movants misconstrue selected passages of two opinions of this Court as purported admissions that the Monitor met with the Court for the purpose of sharing confidential information related to

[20] *See supra* section II.C.1.

the instant proceedings gained during his off-the-record interviews. Both of these sources are examined below.

A. The Consultations Between the Court and the Master

Movants note that the time records of the Master "reveal seven private meetings with the Court for a total of approximately eight hours." Babbitt Motion at 14. They assert that "the timing of the meetings was often very close to the times that the Court and the Special Master issued rulings in this case." *Id.* In support of this assertion, movants state that, prior to the Court's issuance of an order on March 29, 2002 adopting one of the Master's reports, the Master met with the Court on January 14, January 15, and March 2. The Court is not convinced that even the latest of these meetings fell "very close" to the issuance of the Court's March 29 order. Additionally, there is no need to seek a sinister explanation for these meetings with the Court, given the fact that the Master was filing a status report with the Court in mid-January, and a monthly report at the beginning of March.

Of course, the simple fact that the Court has met with its special masters does not establish grounds for recusal. It is not only appropriate but necessary for the Court, as principal, to consult with its agents regarding the manner in which they are carrying out their assigned duties.[21]

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[21] A recent publication presented at an American Law Institute seminar clarifies this distinction:

> It can be argued that masters can not carry out their duties effectively if they are completely prohibited from discussing scheduling, strategies and procedures with the judge outside of the presence of the parties. Yet, in light of ethical

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Moreover, the Rules Advisory Committee anticipated that such discussions would take place during the course of complex litigation matters. While acknowledging that a court might often decide not to conduct off-the-record discussions with its masters, the Committee concluded:

> Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

2001 Rules Committee Report at 143. In complex litigation such as the present action, it is imperative for the Court to hold off-the-record consultations with its special masters in order that they may keep the Court informed about logistical matters related to the case. The parties have always been aware that these discussions were taking

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constraints judges may feel uncomfortable meeting with their masters without the parties present. The appropriateness of such communication can turn on the characterization of the master as a judicial agent or as an outside adjunct. If viewed as an agent of the court, it is proper for the judge, as principal, to discuss with the agent the performance of his/her duties. If the master is viewed as an third party adjunct, it is improper for the judge as ultimate decision maker to receive undisclosed evidence and information from the master that could influence his or her decisions or which might reasonably be thought to do so.

Margaret G. Farrell, The Role of Special Masters in Federal Litigation, ALI-ABA Course of Study, Civil Practice and Litigation Techniques in Federal and State Courts, February 7-9, 2002, available at SG046 ALI-ABA 1005 (Westlaw).

place, and have never felt it necessary to object. Moreover, given the considerable duties that have been delegated to the Master and Monitor, it would be both naive and remiss for the Court to fail to consult regularly with these officials to ensure that they are faithfully administering their duties.

Of course, if the Master had conveyed information he had obtained in an investigatory capacity to the Court during these consultations, it would be a different situation. But the Master never did so. Instead, throughout these regular consultations, the Court discussed with the Master the general nature of the ongoing tasks that the Master was involved with, in order to ensure that the Master was responsibly carrying out the duties to which he was assigned.

Recognizing the need for such consultations between a court and its appointed officials, courts have refused to mandate recusal on the basis of such communications. For example, in *United States v. Yonkers Bd. of Education*, 946 F.2d 180 (2d Cir. 1991), a housing segregation case, the district court appointed an outside housing advisor ("OHA") to provide it with expert advice and assistance regarding the implementation of the court's orders and to coordinate the activity of various parties, including government agencies. *Id.* at 181-82. The defendants moved for recusal under 28 U.S.C. §§ 455(a) and (b)(1), alleging that the judge and the OHA had engaged in improper communications "prior to and at the time of entry of certain indemnification orders," to which the City had not been privy. *Id.* at 182. The defendants also alleged that the OHA had improperly conveyed information regarding the facts of the case, which he had allegedly learned from off-the-record discussions with government counsel, to the

judge. The Second Circuit affirmed the denial of the defendants' motion:

> Disqualification under section 455(b)(1) is not required in this case, since the contacts were made and the information was acquired by Judge Sand in his judicial capacity. While information acquired in a judicial capacity may lead to an appearance of partiality, here it did not because the communications did not relate to "disputed evidentiary facts," contrary to the contention of [the defendants]. . . . The government flatly denies the allegation that it used the OHA as a conduit for improper material. [Defendants have] submitted nothing controverting the government's denial. We conclude that ex parte contacts by the OHA are merely part of the performance of his prescribed duty and did not create an appearance of partiality on the part of the district court judge.

Id. at 184 (citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988)).

Similarly, in *In re Big Rivers Electric Corp.*, 213 B.R. 962 (Bankr. W.D. Ky. 1997), several parties moved to disqualify the bankruptcy judge and his appointed examiner under § 455 based solely on a series of communications between the two.[22] The court denied the motions, explaining that

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[22] Examiners are judicial officials appointed by the court under 11 U.S.C. § 1104(c) to investigate allegations of fraud and misconduct by a debtor in bankruptcy. The court in Big Rivers noted that the order appointing the examiner authorized him "to have greatly expanded powers and duties in addition to those [typically] conveyed upon examiners," including the power to review all the debtor's files and

(Continued on following page)

> where, as in this case, the allegations of impropriety stem from ex parte communications occasioned by the exercise of judicial functions known to the parties and contemplated by unchallenged court orders, such contacts cannot be considered "extrajudicial."

Id. at 976. *See also United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981) ("Knowledge acquired by the judge while he performs judicial duties does not constitute grounds for disqualification."); *United States v. Haldeman*, 181 U.S. App. D.C. 254, 559 F.2d 31, 133 & 134 n.301 (D.C. Cir. 1976) (finding that a district judge's discussions about procedural matters with prosecutors "occurred as part of his official duties" and therefore did not mandate recusal).[23]

In short, the simple fact that the Court has consulted regularly with one of its judicial officials as part of its oversight function over matters in this case does not constitute a basis for recusal.

B. The Consultations Between the Court and the Monitor

Several of the movants seek disqualification of the Monitor "from further proceedings involving these matters."

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records and to prepare a sealed report concerning the validity of the allegations of fraud and misconduct. 213 B.R. at 966.

[23] Additionally, the one state judicial ethics board that has addressed the question "May a judge engage in communications with a special master outside the presence of the parties or their attorneys without violating the prohibition against ex parte communications?" has answered in the affirmative: *see* Arizona Judicial Ethics Op. 95-14 (June 21, 1995).

Babbitt Motion at 1. However, it is a logical impossibility to "disqualify" an official from proceedings in which he is not a participant. As noted above, this Court has only directed the Master, not the Monitor, to issue a report on the September 17 Referrals. Accordingly, there is no basis for demanding the "disqualification" of the Monitor in the instant proceedings because he has no involvement with them.

But movants also claim that because the Monitor has regularly met with the Court, it follows inescapably that the Court must have been receiving information about disputed facts in these proceedings that the Monitor had acquired in the course of his investigative capacity. Movants claim that this conclusion is "supported" by their interpretation of particular sentences found in two opinions of this Court from September of 2002. As demonstrated below, the conclusion that movants have reached rests upon a fundamental misunderstanding of the nature of the Court's consultations with the Monitor, and a fundamental misreading of the opinions of the Court.

1. The Time Records of the Monitor

The Monitor's time records show that he has consulted with this Court on a number of occasions during the course of this litigation. During these consultations, the Monitor informed the Court about his activities, in order that the Court could ensure that the Monitor was earning his keep. In the course of a typical meeting, for example, the Monitor might inform the Court that he planned to travel to New Mexico to meet with the Office of the Special Trustee, and receive a briefing about their role in the historical accounting process. Or he might explain that he

traveled to Billings, Montana to meet with title records office personnel, examine their hard copy records, and review the pilot TAAMS system. Or he might inform the Court that he had been briefed by the Deputy Commissioner of the Bureau of Indian Affairs about the organization of their office. The Monitor mentioned the offices that he had enquired into, and let the Court know whether he was obtaining regular access to higher-level government officials, as he was supposed to. The consultations typically concluded with the Court informing the Monitor which task he should perform next, or with the Monitor suggesting that he should draft a report about the activities he had just concluded.

In short, the subject of these consultations was what the Monitor was doing, not what he was finding. Although the Monitor did tell the Court about the general nature of his activities, the Monitor did not disclose any of the bare facts that he might have uncovered during his investigations. These consultations were a necessary component of the Court's oversight function over its special masters. It is not beyond the realm of possibility that in the course of one of these consultations, the Monitor might have incorporated into his discussion some piece of information that would arguably constitute a "fact" rather than a general description of his activities. But the Court can declare unequivocally that it knows of no such information that was provided during any of these consultations. Given that, to the Court's knowledge, the Monitor never disclosed to the Court any of the naked facts that the Monitor had uncovered in the course of his investigations, his consultations with the Court furnish no basis for recusal.

As a recent case from this Circuit makes clear, the simple fact that the Court received logistical information

about the Monitor's ongoing activities does not mandate recusal. In *Clifford v. United States*, 329 U.S. App. D.C. 1, 136 F.3d 144 (D.C. Cir. 1998), during the course of a criminal forfeiture proceeding, the district court appointed a trustee to liquidate the defendant bank's assets. *Id.* at 146. Two former bank officers, who were parties in several related civil cases, requested notes from an in camera discussion between the judge, the trustee, government counsel, and counsel for the bank's fiduciaries, as well as a sealed report that had been filed by the trustee. *Id.* at 147. The officers' justification for their request was their contention that the discussion and the report related to their civil suits. *Id.* The district court denied the request, explaining that the materials were not directly related to the ongoing civil cases, and the officers appealed. *Id.* at 148. The D.C. Circuit, noting that the district judge had "found that the contents of these communications did not concern the merits of appellants' pending civil actions," affirmed, "deferring to the trial court's factual determination." *Id.* at 150. The court also rejected the claim that the district judge's communications with a court-appointed official constituted a per se violation of the officials' due process rights. It explained that because, "as a matter of court management and efficiency, the assignment of related matters to a single judge is preferred. . . . trial judges frequently receive extraneous information about parties appearing before them but are presumed to disregard it." *Id.* at 148. The court noted that "judges are presumed to be able to compartmentalize the information they receive and only rely on evidence relevant for a particular decision," and discussed the reasoning supporting this presumption:

> When a party conveys ex parte information to a judge that relates to a pending case, courts presume

> that the trial judge, who is in the best position to evaluate the information, can adequately determine whether such communications go to the merits of the case and promptly stifle them or require disclosure when necessary. Without such a presumption, the process for handling litigation would become inordinately complex, occasioning additional delays and encumbering burdened trial judges with piecemeal responsibilities incompatible with the necessities of efficient trial management.

Id. at 149, 150 (citations omitted). In the instant case, the Court has determined that the Monitor has not conveyed any factual information gained in the course of his investigative role during any of his consultations with the Court. Accordingly, it is beside the point whether the discussions with the Monitor may or may not have incidentally referred to the parties in the instant proceedings. The Court will disregard any such information in its rulings, and will make its findings of fact and conclusions of law based solely on the evidence found in the record of this case.

2. The Opinions Quoted by Movants

Movants point to individual passages from two opinions of this Court that they claim constitute tacit admissions that it received information from the Monitor regarding the instant proceedings that the Monitor had obtained from confidential interviews. Any honest reading of these opinions, however, demonstrates that movants have fundamentally misconstrued these passages.

a. September 17, 2002 Memorandum and Order

In order to present in their proper context the parts of the Court's September 17, 2002 Memorandum and Order that movants have selectively quoted, it will be necessary to relate at some length the events that led up to that opinion. The Monitor met with Secretary Norton on April 24, 2001 to discuss his monitoring duties with her, as well as the authority that had been conveyed by his appointment order. Mem. and Order dated September 17, 2002 (Denying Mot. to Revoke Court Monitor) at 3 ("September 17 Order"). On November 1, 2001, Deputy Interior Secretary J. Steven Griles approached the Monitor. *Id.* at 4. The Deputy Secretary explained that Secretary Norton had requested that the Monitor commence a series of meetings with the Deputy Secretary and his senior subordinates. *Id.* He further explained that the meetings would have a dual purpose: to allow the Deputy Secretary to "address the concerns of the Court Monitor and resolve them to further trust reform without the need to involve the parties in additional litigation" and to "alleviate the need for the Court Monitor to submit further Reports to the Court unless the Deputy Secretary could not or would not correct the issues giving rise to those concerns." *Id.* The Monitor responded that because the proposed meetings would be with senior Interior Department officials, and would take place without the participation of plaintiffs or their counsel, he would need to discuss the matter with the Court. On that same day, after the Monitor had informed the Court of the Deputy Secretary's proposal, and explained the purpose and intent of the proposed meetings, the Court authorized the Monitor's attendance at this series of meetings. *Id.* Thereafter, the Monitor met regularly with the Deputy Secretary, with Associate Deputy Secretary

James Cason, and with Director of Indian Trust Transition Ross Swimmer for over six months. *Id.* at 4-5.[24]

As discussed above, it is the Court's practice to consult regularly with its masters as part and parcel of its oversight function over its judicial officials. Accordingly, from November of 2001 until April of 2002, the Monitor kept the Court informed of the general nature of these meetings. The Monitor did not relate the details of his various conversations with the Interior officials; rather, he informed the Court that the meetings were still going on, and related the general topics of discussion (e.g., that the officials had discussed the Bureau of Indian Trust Asset Management, or had discussed the Office of the Special Trustee). The Monitor also informed the Court that Griles, Swimmer, and Cason were continually imploring the Monitor to keep the Court informed that these meetings were still going on because they sought to persuade the Court that the Interior Department was making every effort to comply with its fiduciary responsibilities.

In April of 2002, the Monitor informed the Deputy Secretary that a dispute was developing between Secretary Norton and Special Trustee Thomas Slonaker regarding the appropriate role of the Special Trustee. *Id.* at 10. The Deputy Secretary asked the Monitor if he would attend a meeting between the Deputy Secretary and the Special Trustee in an attempt to resolve the dispute. *Id.* The Monitor responded that he could do so only if the Court expressly authorized his attendance at the meeting

[24] It should be noted that these three men are not among the thirty-nine individuals who are the subject of the September 17 Referrals.

and provided its approval for the role that the Monitor was being asked to undertake during the meeting. *Id.* at 10-11. Accordingly, the Monitor met with the Court on April 18 to discuss the Deputy Secretary's request, and the Monitor presented the background facts surrounding the request. *Id.* at 11. Based on the representations of the Monitor, the Court authorized his participation in the meeting, which took place the following day. *Id.* As the Monitor later stated in his Seventh Report, during the meeting, the Interior Department refused to acknowledge that the Special Trustee's role included overseeing and reporting to Congress, and advising Secretary Norton on the problems with the Department's trust reform activities. *Id.* Even though the meeting had proven unsuccessful, however, the Monitor continued to meet with the Deputy Secretary. *Id.* at 13.

On June 14, 2002, defendants moved to revoke the Monitor's appointment, claiming that he was "unfit to perform the significant responsibilities assigned to the Court Monitor in this case and that the Court must therefore revoke his appointment." Interior Defs.' Mem. in Support of Mot. to Revoke the Appointment of Joseph S. Kieffer, III, and to Clarify the Role and Authority of a Court Monitor, at 17 ("the Revocation Motion").[25] Included with defendants' motion were declarations from the three officials that the Monitor had met with between November 2001 and April 2002, namely, Deputy Secretary Griles,

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[25] It is interesting to note that defendants brought their motion to disqualify under 28 U.S.C. § 455(a) and (b)(1), the very same statutes under which movants have brought their present motions to disqualify the Special Master, to disqualify the Special Master-Monitor, and to recuse the Court.

Associate Deputy Secretary Cason, and Director of Indian Trust Transition Swimmer. *See* Attachments E, F, and G to the Revocation Motion. These declarations discussed in detail the substance of the conversations that took place during the April 19 meeting with the Special Trustee, and included direct quotations that were attributed to the Monitor. The Court subsequently denied defendants' motion in a memorandum and order dated September 17, 2002.

It is this memorandum and order that movants cite in support of their conclusion that the Monitor provided the Court with information related to these proceedings that the Monitor had obtained in the course of his investigative capacity, mandating the recusal of the Court. But all that this opinion demonstrates is the simple fact that the Monitor obtained the Court's authorization for a six-month series of meetings with Interior Department officials, and then kept the Court apprized of the fact that those meetings were taking place. Thus, for example, the Court noted that

> the Court Monitor met with Mr. Griles on at least twenty occasions for approximately thirty hours. While it is not the Court's intention to compound the violation of the confidential ex parte nature of these discussions (as was done by the Deputy Secretary and his subordinates when they filed their declarations), suffice it to say that those discussions, reported to this Court by the Court Monitor, ranged far and wide on the trust reform efforts of Mr. Griles, as the Secretary's appointed "man in charge" of trust reform. As with Mr. Rossetti, the Court Monitor, at the request of the Deputy Secretary, described the reviews he conducted of the progress of trust reform

> and the historical accounting and answered all questions posed by the Deputy Secretary and his key subordinates about their plans and operations regarding these matters. While not specifically identifying the subject matter of those discussions here, the Court was aware that they involved matters that later became the subject of the Court Monitor's Fifth (the historical accounting), Sixth (the Eighth Quarterly Report), and Seventh (the Special Trustee) Reports to the Court. Also during this same period, the Secretary's proposed Bureau of Indian Trust Asset Management (BITAM) was under formation and review at Interior and was and is also a subject of the Court Monitor's continuing review.

Id. at 5-6 (emphasis in original). Movants have apparently misread the second and fourth sentences of this paragraph as tacit admissions of improper behavior on the part of the Monitor and this Court. But the only thing that this paragraph relates is the fact that during his meetings with the Court, the Monitor reported that his conversations with Deputy Secretary Griles related to the Deputy Secretary's efforts at trust reform, and let the Court know that the reports he was planning to file would touch upon what was discussed during these meetings. In short, the Monitor, as was his practice, consulted with the Court, and informed it of the activities in which he was currently engaged.

The memorandum and order also noted that the declarations of Griles, Cason, and Swimmer "utterly failed to report accurately the facts surrounding the reason the Deputy Secretary requested the Court Monitor's attendance at [the April 19] meeting, the circumstances under which he was authorized by this Court to participate in

the meeting, and the reasons for the continuing dialogue about the Special Trustee that was held with the Deputy Secretary before, during, and after this meeting." *Id.* at 9. Accordingly, the Court attempted to clarify the circumstances surrounding this meeting :

> This Court has given serious consideration to hearing testimony on the instant motion to include that of the Court Monitor and the former Special Trustee to fully document the six month history of meetings between the Court Monitor and the Deputy Secretary, always at the latter's request, and the uses to which the Deputy Secretary may have improperly attempted to bend the good will efforts of the Court Monitor to defendants' own benefit. However, the Court is personally aware of the background of the April 19, 2002 meeting, the conversations at that meeting and at the subsequent meetings between the Deputy Secretary and the Court Monitor. Contemporaneous reports by the Court Monitor to the Court and the public record are sufficient to avoid the necessity of lifting the ex parte veil from these meetings any further than it has been torn by the words of the Deputy Secretary in his declaration and those of his subordinates in theirs.
>
> There is a simple truth regarding the Court Monitor's participation in and presentation at this meeting. In several meetings prior to the April 19, 2002 meeting, the Court Monitor apprised the Deputy Secretary that there was a dispute developing between the Secretary and the Special Trustee (with a central role being played by the Deputy Secretary in threatening to fire the Special Trustee) regarding the appropriate role of the Special Trustee. The Court Monitor had

> also alerted the Deputy Secretary that he had planned, before learning of this dispute, to submit a Report of his review of the Special Trustee's role in the trust reorganization underway within the Interior Department. That review would have to include this dispute if it were not resolved. The Deputy Secretary was the person that requested the Court Monitor meet with both the Special Trustee and him to discuss the issue.
>
> The Court is aware of the substance of these meetings concerning the Special Trustee and of the meeting held by the Deputy Secretary with the Court Monitor the day before the April 19, 2002 meeting. The Court Monitor had agreed to attend the latter meeting at the request of the Deputy Secretary only if this Court authorized that attendance and approved the role the Deputy Secretary asked the Court Monitor to undertake during the April 18, 2002 meeting. Based on a review with the Court Monitor of the presentation of the facts surrounding the request of the Deputy Secretary at the prior meeting, his pledge to honor the previous ex parte agreement with the Court Monitor, and that he would provide notice to and receive agreement from defendants' counsel that the meeting could take place in the manner requested, without the attendance of counsel, this Court authorized the Court Monitor to honor the Deputy Secretary's request and attend and participate in the meeting.

Id. at 9-11 (emphasis in original). As already explained, the only reason that the Court knew anything about the April 19 meeting, or the background relating to that meeting, is that the Monitor was compelled to "present[] the facts surrounding the request of the Deputy Secretary" to hold the meeting, in order that the Court could make an

informed decision about whether to authorize the Monitor's attendance at the meeting. Movants have apparently inferred from the Court's description of this single incident that the Monitor's standard practice is to convey to the Court the substance of his conversations with third parties, including his ex parte discussions with lower-level government employees. But this inference is wholly unwarranted. As explained above, it was only the extraordinary nature of the Deputy Secretary's request that the Monitor serve as a mediator between the Deputy Secretary and the Special Trustee that compelled the Monitor to provide the Court with the factual background surrounding the April 19 meeting. Indeed, if the Monitor had regularly provided the Court with a detailed account of his conversations with the Deputy Secretary and his subordinates, it would certainly be unnecessary for the Court to consider "hearing testimony on the [Revocation Motion] to include that of the Court Monitor and the former Special Trustee to fully document the six month history of meetings between the Court Monitor and the Deputy Secretary . . . and the uses to which the Deputy Secretary may have improperly attempted to bend the good will efforts of the Court Monitor to defendants' own benefit." After all, what would be the need to hear any such testimony, if the Court was purportedly receiving a detailed play-by-play on the entire series of meetings from the Monitor as they occurred?

In short, the conclusions that movants have made, based on the September 17 memorandum and order, are derived from unwarranted inferences based upon a fundamental misunderstanding of the language contained in this opinion.

b. September 30, 2002 Memorandum and Order

Movants also isolate a single sentence from a memorandum and order dated September 30, 2002 addressing objections by defendants regarding the reasonableness and propriety of the Monitor's compensation requests. Defendants had alleged that the requests did not provide sufficient details about the work that the Monitor had performed. In response, the Court first noted that unlike the situation in which a prevailing party submits a proposed fee bill to a court, which warrants scrutiny of the hours billed by the opposing party, in the instant case, "both the Court Monitor's activities and his compensation requests are subject to monthly review by this Court." Mem. and Order dated September 30, 2002 at 4. In response to defendants' specific concern that the Monitor's compensation requests did not reveal the identities of every person with whom he met, the Court reminded defendants of the necessity that the Monitor not disclose publicly the names of these persons :

> This Court drafted the ex parte language in the orders appointing the Court Monitor and extending his appointment for the express purpose of preventing any renewed retaliatory action in conjunction with his monitoring activities. The Court Monitor was required to remain independent of any control by defendants or their surrogates so as not to impair his ability to conduct his investigation.

Id. at 5. Accordingly, the Court explained, it had

> authorized the Court Monitor to hold in confidence the identity of such entities, as well as the substance of any statements made by their employees

> to him. It would be manifestly improper for the Court Monitor's compensation requests to violate such confidences by naming the persons with whom he has met or describing the nature of their conversations. It is sufficient that the Court Monitor has advised this Court regarding his meetings and discussions with third parties and has always informed this Court about the nature, extent, and substance of such meetings and discussions upon request. To provide defendants access to information about the Court Monitor's discussions regarding defendants' trust reform activities, including the names of persons with whom he conducts such discussions, would allow defendants to influence or control the information that the Court Monitor receives. Defendants understood this problem when they consented to the Orders appointing the Court Monitor and the extension of that appointment.

Id. at 4.

Movants have misconstrued the sentence "It is sufficient that the Court Monitor has advised this Court regarding his meetings and discussions with third parties and has always informed this Court about the nature, extent, and substance of such meetings and discussions upon request" as a supposed admission that the Court and the Monitor have engaged in substantive discussions of the facts discovered by the Monitor in the course of his investigative duties. The remainder of the opinion belies this misinterpretation of this sentence. This sentence relates the simple fact that the Court has conferred with the Special Master-Monitor in order to keep abreast of his activities, and to ascertain that he is abiding by the mandate provided in his order of appointment. Additionally, when the Court has made a request that he do so, the

Monitor has told the Court what the subject matter of his discussions with third parties was: for example, that the Monitor had been briefed about the organization of the office of the Bureau of Indian Affairs. Perhaps the Court might have stated, more accurately, that "the Monitor has always informed this Court about the nature and essence of such meetings and discussions, whenever the Court has requested it." But the Court did not anticipate that movants would be extracting isolated sentences from its opinions and marshaling them forth as purported "evidence" of the unwarranted conclusions that movants have set out in their various motions.

C. The Legal Standards for Recusal

1. 28 U.S.C. § 455(b)(1)

28 U.S.C. § 455(b)(1) provides, in relevant part, that a judge shall "disqualify himself . . . (1)where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Section 455(b)(1) requires a moving party to demonstrate actual bias or prejudice based upon an extrajudicial source. *Tripp v. Executive Office of the President*, 104 F. Supp. 2d 30, 34 (D.D.C. 2000). As explained above, the Court has not received extrajudicial knowledge of disputed facts in this litigation. Accordingly, there is no basis for its recusal under Section 455(b)(1).

The two opinions that movants invoke in support of recusal under this section are inapposite because they involve situations in which the court engaged in ex parte communications with court-appointed expert witnesses relating to the merits of the underlying litigation. In *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996), the Seventh

Circuit Court of Appeals disqualified a district judge from a case in which he repeatedly met outside the presence of counsel to discuss the merits of the case with an appointed panel of expert witnesses scheduled to testify at trial. *Id.* at 257-58. Because the district judge "declined to state on the record his own memories of what happened," and instead chose to invoke an unspecified "judicial privilege," the Seventh Circuit was forced to assume that the conversations involved a discussion of the merits of the litigation. *Id.* at 258. Accordingly, because the judge had effectively appointed agents to conduct investigations of disputed facts in the litigation, and then disclose the naked evidence they had learned in private sessions with him, the Seventh Circuit disqualified the judge, explaining that his discussions with the experts were "calculated, material, and wholly unnecessary." *Id.* at 259. By contrast, in the instant case, the Court has explained that the consultations with its special masters did not include discussions of facts that the masters had learned in their investigative capacities. Moreover, the Court has described the nature of those consultations as best as it can without compromising the confidence that the masters have placed in the Court. In contrast to the "wholly unnecessary" meetings conducted by the Edgar judge, this Court's regular consultations with the special masters were essential to ensure that these officials were faithfully carrying out the duties assigned to them under their appointment orders.

The only other case cited by movants, *United States v. Craven*, 239 F.3d 91 (1st Cir. 2001), is also inapposite. In that case, the district judge had based a downward sentencing departure solely on a one-hour ex parte conversation about the merits of the case with a court-appointed psychologist. *Id.* at 95-96. The First Circuit declared that

"a sentencing court may not utilize an ex parte conversation with a court-appointed expert as a means to acquire information critical to a sentencing determination and then rely on that information in fashioning the defendant's sentence." *Id.* at 101. Because the appellate court "believed that it would be surpassingly difficult for [the judge] to disregard the guidance that she previously received from Dr. Weisman" in passing sentence, it remanded the case to a different judge. *Id.* at 103. In the instant case, however, the Court has received no such improper "guidance" from either of its special masters on the merits of the instant proceedings. And unlike the Craven judge, the Court has made no ruling – and it will not make any future ruling – based on its off-the-record consultations with the special masters. Indeed, there would be no way for the Court to making a ruling based on these discussions, because they involve matters of logistics, not the merits of the underlying litigation. Accordingly, the only substantive decisions by the Court that have depended upon the findings of the Master or the Monitor are those which rely upon their written reports to the Court. These reports are provided to the parties, and any findings of fact and legal conclusions contained in them are subject to objections by either party.

In short, because the Court possesses no "personal knowledge of disputed evidentiary facts concerning the proceeding," there is no basis for its recusal under 28 U.S.C. § 455(b)(1).

2. 28 U.S.C. § 455(a)

28 U.S.C. § 455(a) provides that a federal judge shall "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Whether there is

any basis for questioning a judge's impartiality under § 455(a) is to be determined by an objective standard. *United States v. Microsoft*, 346 U.S. App. D.C. 330, 253 F.3d 34, 114 (D.C. Cir. 2001) ("The question is whether a reasonable and informed observer would question the judge's impartiality."); *In re Barry*, 292 U.S. App. D.C. 39, 946 F.2d 913, 914 (D.C. Cir.1991). This standard "assumes that a reasonable person knows and understands all the relevant facts." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2nd Cir.1988), *cert. denied*, 490 U.S. 1102 (1989) (emphasis omitted).

This Court finds that no reasonable observer, with knowledge of all the relevant facts, would conclude that the impartiality of the judge in this case was to be questioned. Movants' basis for recusal under this section is founded upon its allegation that the consultations between the Court and its two special masters "would cause any reasonable person to have reason to question the Court's impartiality." Most Motion at 4. But as explained above, neither the Master nor the Monitor has conveyed to the Court any of the bare factual information that they might have learned in the course of their investigative duties. Accordingly, it is difficult to fathom why any objective observer might harbor any doubts about the Court's impartiality in this case.

III. MOTION TO TAKE FULL DISCOVERY OF THE SPECIAL MASTERS

In the event that their motions for recusal and disqualification are not well taken, movants seek, in the alternative, to "take full discovery" of the Master and Monitor relating to their off-the-record consultations with

the Court. Brooks Motion at 2. The Court concludes that the extreme step of authorizing discovery of judicial officers is unwarranted in the present situation.

Oral examination of a judicial or quasi-judicial officer as to matters within the scope of his adjudicative duties should be permitted only upon a strong showing of bad faith or improper behavior." *United States v. Ianniello*, 740 F. Supp. 171, 187 (S.D.N.Y. 1990), rev'd on other grounds sub nom. *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991). The First Circuit has held that while a party may seek discovery relating to a recusal motion, "the allowance of such discovery is within the sound discretion of the court." *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997).

In *United States v. Pollard*, 747 F. Supp. 797 (D.D.C. 1990), the defendant moved for recusal of the district judge under 28 U.S.C. § 455(a) and (b)(1), based on an affidavit purporting to describe a conversation between the judge and a deceased Supreme Court Justice. *Id.* at 799. According to the affidavit, the Justice had told the affiant of a conversation with the district judge, in which the judge related that when he sentenced the defendant, he had relied on materials submitted ex parte by the government. *Id.* The defendant claimed that because he could "only pursue this inquiry through an evidentiary hearing," and because the only available witness who could testify about the matter was the district judge, it would be necessary for the judge to recuse himself. *Id.* Explaining that the allegation was false, the district judge denied the defendant's recusal motion. *Id.* at 801 & n.4. The D.C. Circuit affirmed, noting that

> the district judge in this case was, of course, intimately familiar with the record and knew as a matter of fact whether or not the government had submitted ex parte material to him. The Chief Judge attested that it had not. He accordingly denied the motion for a hearing. We believe the Chief Judge was well within his discretion to do so.

United States v. Pollard, 295 U.S. App. D.C. 7, 959 F.2d 1011, 1031 (D.C. Cir. 1992). The court noted that the defendant's motion for a hearing "may have been designed primarily to force the judge to recuse himself." *Id.* at 1031 n.13. This Court has similar suspicions about movants' demands to depose the Master and Monitor, given that a court which decides to permit one of its judicial officials to be deposed creates a serious risk that its decision will mandate its own recusal. *See, e.g., Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593, 598-99 (5th Cir. 1977) (finding that the decision of a district judge to permit his law clerk to testify at trial constituted reversible error); *Terrazas v. Slagle*, 142 F.R.D. 136, 139 (W.D. Tex. 1992) (refusing to permit defendants to depose the presiding judge's law clerks because "the mere taking of the depositions of the law clerks will have the legal effect of disqualifying the employing judges"); *United States v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982) (granting motion to recuse district judge because his former law clerk had testified before the grand jury). Therefore, for this Court to set a precedent by authorizing the deposition of the special masters would allow parties to any complex litigation requiring the use of special masters to achieve indirectly what they would be unable to achieve directly – namely, the recusal of the presiding judge. This the Court refuses to do.

The case law from other circuits on this issue also weighs heavily against movants. In Yonkers, discussed above, the Second Circuit affirmed the district judge's denial of a motion to compel discovery of its court-appointed outside housing advisor regarding communications between the advisor and the judge. The court explained that "discovery of the substance of challenged communications between Judge Sand and the OHA is not appropriate, as a degree of confidentiality in the relationship between the court and its housing advisor is justifiable in light of attempts to block implementation of [the consent decree] by the City and other groups." *Yonkers*, 946 F.2d at 185.

In *Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570, 1572 (M.D. Ga. 1992), plaintiffs served three federal district judges with notices to take depositions and subpoenas duces tecum in connection with a motion to disqualify the presiding judge. The disqualification motion was based upon alleged communications between the presiding judge and the other two judges. *Id.* at 1574-75. A fourth judge granted the three judges' motions to quash the notices of deposition and subpoenas. The court commenced its opinion by asserting that

> broadly stated, the issue to be determined is whether, and under what circumstances, if any, a judicial officer may be compelled to personally submit to discovery inquiries in aid of a motion to disqualify one of such officers from proceeding further in a case over which he or she is presiding.

Id. at 1573. Though it acknowledged that discovery might be warranted in an "appropriate case," the court refused to permit plaintiffs to take discovery from the three judges.[26] It held that "compulsory discovery process addressed to the presiding judge in aid of a motion to disqualify that judge pursuant to 28 U.S.C. §§ 144 and 455(a) is not available to a litigant upon initial presentation of the motion or the request for such discovery in the district court." *Id.* at 1583. With respect to the two non-presiding judges, the court determined that

> while there is no rigid impediment to the taking of their depositions as there is in the case of Chief Judge Owens as the presiding judge, I have nonetheless determined that neither should be subject to compulsory discovery process in the circumstances of this case. On the basis of the showing made in support of the asserted need for such discovery, the only line of inquiry to be addressed to either would relate to judicial communications between or among the three judges, and that information is simply not relevant, i.e., it does not relate to extra judicial bias.

Id. at 1584.

Even if the Court were to agree that discovery of judicial officers might be warranted in an appropriate case, the present case is manifestly not one of them. The

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[26] The opinion defined "appropriate case" as "a case in which the party seeking discovery is able to demonstrate in good faith, pursuant to Rule 26, a substantial basis for believing that the discovery being sought 'appears reasonably calculated to lead to the discovery of admissible evidence' in support of a pending or contemplated motion for disqualification, and that such information is not 'obtainable from some other source that is more convenient.'" *Id.* at 1580 n.17.

sole line of inquiry that movants seek to pursue relates to communications which, as explained above, neither conveyed information about disputed facts in these proceedings nor imparted an extrajudicial bias to the presiding judge. Movants have not cited any case or statute in support of their request, and this Court knows of no case in which a court has authorized discovery to be taken upon judicial officers. On the other hand, courts that have considered the issue have refused to permit discovery to be taken upon special masters. *See, e.g.*, *Gary W. v. State of Louisiana Dep't of Health & Human Servs.*, 861 F.2d 1366 (5th Cir. 1988) (affirming decision to quash subpoena and notice of deposition upon special master); *McCoy v. Belmont*, 1999 U.S. Dist. LEXIS 21815, 1999 WL 33117446 (D. Conn. 1999) (refusing to permit discovery upon special master). Moreover, the Master and Monitor consented to their appointments in this case based on the understanding that their consultations with the Court about logistical matters would remain confidential, in order that neither party could make use of these discussions to attack the other party. The Court will not betray the confidence that these officials have reposed in it by permitting movants to interrogate them about their consultations with the Court. Accordingly, the Court declines to take the extraordinary step of compelling the deposition of the two special masters in this case.

IV. CONCLUSION

This Court takes seriously any issue that might prompt its recusal or the disqualification of its special masters. But movants have failed to demonstrate that recusal of the Court is required under either 28 U.S.C. §§ 455(a) or (b)(1). It is, admittedly, a tempting prospect

for the Court to contemplate recusing itself, given the hundreds of judicial hours that this case has consumed, and the innumerable antagonisms it has fostered. In many ways, it would be a welcome relief for the Court to slough off the burdens of this seven-year litigation onto some other judge, unmindful of the headaches it has provoked. But the Court would be abdicating its judicial responsibilities, were it to do so. A district judge is under just as much of an obligation not to recuse himself unnecessarily as he is obliged to recuse himself when it does prove necessary. *In re Certain Underwriter*, 294 F.3d 297, 302 (2d Cir. 2002). Therefore, the Court, mindful of its obligations under the law, will not recuse itself from these proceedings.

Movants have also failed to demonstrate the necessity for disqualification of the two special masters or of taking discovery from the special masters. Accordingly, it is hereby

ORDERED that Anne Shields' Motion for Recusal, or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1581-1, 1581-2]; Philip A. Brooks' Motion for Recusal, or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1582-1, 1582-2]; Motion for Recusal (Bruce Babbitt, John Leshy, Edward Cohen, and Edith Blackwell) [1583-1]; Charles W. Findlay's Motion for Recusal, or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1645-1]; Michael Rossetti's Motion for Recusal or, in the Alternative, to Take Discovery Regarding Ex Parte Communications [1595-1]; John S. Most's Motion for Recusal of Royce C. Lamberth or in the Alternative, to Take Discovery Relating to Ex Parte Communications [1601-1]; Motion for Recusal, or in the Alternative, to Take Discovery Related

to Ex Parte Communications (Michael Carr) [1646-1]; Tom Clark II's Motion for Limited Recusal [1665-1]; David Shuey's Motion for Recusal, or in the Alternative, For Leave to Take Discovery to Ex Parte Communications [1672-1]; Motion of Sarah Himmelhoch for Recusal, or, in the Alternative, for Discovery Relating to Ex Parte Communications [1675-1]; Motion of Kenneth F. Rossman for Recusal, or, in the Alternative, for Discovery Relating to Ex Parte Communications [1679-1]; Motion for Recusal and Disqualification or, in the Alternative, to Take Discovery Regarding Ex Parte Communications (Sabrina McCarthy) [1683-1]; and Steven Swanson's Motion for Recusal and Disqualification or, in the Alternative, to Take Discovery Regarding Ex Parte Communications [1689-1] be, and hereby are, DENIED.

SO ORDERED.

Date: January 17, 2003

Royce C. Lamberth

United States District Judge

ELOUISE PEPION COBELL, et. al., Plaintiffs, v. GALE A. NORTON, Secretary of the Interior, et. al., Defendants.

Civil Action Number 96-1285 (RCL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

226 F. Supp. 2d 163; 2002 U.S. Dist. LEXIS 17356

September 17, 2002, Decided

COUNSEL: For ELOUISE PEPION COBELL, plaintiff: Keith M. Harper, NATIVE AMERICAN RIGHTS FUND, Elliott H Levitas, KILPATRICK STOCKTON, LLP, Dennis Marc Gingold, Washington, DC.

For GALE NORTON, federal defendant: Mark E. Nagle, Robert Craig Lawrence, J. Christopher Kohn, Seth Brandon Shaprio, Sandra Peavler Spooner, David J. Gottesman, Peter Blaze Miller, Cynthia L. Alexander, Tracy Lyle Hilmer, Dodge Wells, John Stemplewicz, Amalia D. Kessler, Washington, DC.

For GALE NORTON, federal defendant: Herbert Lawrence Fenster, MCKENNA & CUNEO, LLP, Washington, DC.

JUDGES: Royce C. Lamberth, United States District Court.

OPINION BY: Royce C. Lamberth

OPINION:

MEMORANDUM AND ORDER

This matter comes before the Court on defendants' Motion To Revoke The Appointment Of Joseph S. Kieffer, III, And To Clarify The Role And Authority Of A Court

Monitor, filed June 14, 2002 ("Revocation Motion"). As the basis for the Revocation Motion, defendants claim the Court Monitor's activities in carrying out his duties pursuant to his authority under the appointment Order of this Court, dated April 16, 2001, and the reappointment Order, dated April 15, 2002, have "exceeded the constitutional and statutory limits of the Court's jurisdiction" and the authority delegated to him under those Orders. *Id.* at 1. Additionally, defendants claim that the Court Monitor has "demonstrated a lack of impartiality that requires his disqualification from further participation in this case." *Id.* Defendants also request that, if the Court determines that a continuing role for a court monitor is appropriate in this case, "the Court clarify the proper limits on the role and authority of any future court monitor . . . and its previous orders regarding the role and authority of a court monitor to make them consistent with the constitutional and statutory limits on the Court's jurisdiction and to ensure in the future that the court monitor's activities will conform to these limits and to the proper role of a judicial officer." *Id.* at 1-2. Upon consideration of the memoranda filed in support or and in opposition to the defendants' motion, the record in this case, and the applicable law, the Court finds that the motion should be denied.

I. BACKGROUND

A. The Court Monitor Appointment Order

On April 16, 2001, this Court, with the consent of the plaintiffs and defendants, appointed Mr. Kieffer as Court Monitor with the specific authority to "monitor and review all of the Interior defendants' trust reform activities and file written reports of his findings with the Court. These reports shall include a summary of the defendants' trust

reform progress and any other matter Mr. Kieffer deems pertinent to trust reform." *See* Order filed April 16, 2001 at 2. Mr. Kieffer was also "permitted to make and receive ex parte communications with all entities necessary or proper to effectuate his duties." *Id.* Defendants were enjoined to "assist Mr. Kieffer in the execution of his duties and responsibilities . . ." and "provide Mr. Kieffer with access to any Interior offices or employees to gather information necessary or proper to fulfill his duties." *Id.*

This Court extended Mr. Kieffer's term of service as Court Monitor on April 15, 2002, pursuant to the Court's Order of April 16, 2001. *See* Order filed April 15, 2002.

B. Government Counsel's Consent to the Order As A Means To Lessen Litigation

The Court placed on the public record the meetings that it had held with the parties about the Court Monitor's appointment and their consent to it on April 16, 2001, in open court. Counsel for defendants responded to the Order by stating: "Mr. Brooks: Your Honor, the government wants to put on the record that it consents to this order and appreciates the court's time and attention to this, and we hope that this will in fact be a positive step forward so that resources can be more directed towards trust reform and less directed towards litigation. And perhaps this will be a positive step between the parties as well. Thank you, Your Honor." *See* Transcript of Status Hearing, April 16, 2001, at 5.

C. The Secretary's Endorsement of The Court Monitor's Authority and Establishment of a Dialogue With Her Key Subordinates

The Court Monitor met with the Secretary on April 24, 2001 and addressed his duties and responsibilities with her including the authority conveyed to him by the April 16, 2001 Order. On that same day, the Secretary issued a memorandum to all employees of the Department of the Interior that repeated the Order's grant of the Court Monitor's authority including that he was permitted to make and receive ex parte communications with all entities necessary or proper to effectuate his duties. The Secretary notified all of her employees that Mr. Kieffer "must be provided access to records and documents of the Department, its bureaus and offices, as well as to any officer and employee of the Department and to any of its offices, bureaus or contractors that he deems necessary for the accomplishment of his duties. . . ."[1]

The Secretary also assigned her Counselor, Michael Rossetti, to meet with Mr. Kieffer so that any concerns of the Court Monitor could be conveyed to the Secretary in order that she might address them and avoid the necessity of the Court Monitor later making a report to this Court about those concerns. This dialogue first took place with Mr. Rossetti during the spring of 2001, as the Court Monitor reviewed the defendants' efforts (or lack thereof) to conduct a historical accounting project.

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[1] *See* Secretary of the Interior memorandum, dated April 24, 2001, entitled, "Appointment of Joseph S. Kieffer, III." at Exhibit 2, Plaintiffs' Motion For Order To Show Cause Why Interior Defendants, And Their Senior Managers And Counsel Should Not Be Held In Civil Contempt For Violating The Court's April 16, 2001 And April 15, 2002 Orders, at 1-2.

D. The Deputy Secretary's Request For a Renewed Dialogue

In his declaration, The Deputy Secretary speaks of requesting the Court Monitor to meet with him and the Special Trustee on April 19, 2002 to discuss concerns about the role of the Special Trustee and his office. *See* Declaration of J. Steven Griles, June 4, 2002 at 1. To read Mr. Griles' declaration, it would appear that this was the first time that Mr. Griles ever requested the Court Monitor to meet with him and his subordinates at the Interior Department. In this regard, the Deputy Secretary's declaration exhibits an alarming lack of candor and comes perilously close to perjury by omission.[2] The Deputy Secretary knows that this Court was aware of the Deputy Secretary's oral request on November 1, 2001, on behalf of the Secretary, made to the Court Monitor, to begin a dialogue with the Deputy Secretary and his senior subordinates with the *express* authorization of this Court. The meetings were for the Deputy Secretary to address the concerns of the Court Monitor and resolve them to further trust reform without the need to involve the parties in

[2] That the Department of Justice would allow the Deputy Secretary's declaration to so glaringly omit any mention of the substance and six month duration of the meetings between the Court Monitor and the Deputy Secretary, to include those that followed the April 19, 2002 meeting, or this Court's authorization of them, is a renewed example of the improper conduct of the government attorneys who have represented the defendants in this litigation. Two sets of Department of Justice attorneys have been dismissed during the course of this litigation for conduct involving matters addressed in the two contempt trials held by this Court. Now a third set of government attorneys have either failed to make appropriate inquiries and conduct the requisite due diligence in documenting their justification for the revocation of the appointment of the Court Monitor or have suppressed their knowledge of the truth.

additional litigation. Also, their purpose was to alleviate the need for the Court Monitor to submit further Reports to the Court unless the Deputy Secretary could not or would not correct the issues giving rise to those concerns. The Deputy Secretary is also aware that dialogue, once authorized by this Court on that same date, with the understanding that the defendants' counsel had agreed to this ex parte contact between the Deputy Secretary, his key subordinates, and the Court Monitor, began that evening and continued on a regular basis with him and his key subordinates, the Associate Deputy Secretary, Mr. James Cason, and the Director of Indian Trust Transition, Mr. Ross Swimmer, for a period of over six months including the April 19, 2002 meeting with the Special Trustee and his Principal Deputy, Mr. Tommy Thompson (by conference phone). That dialogue continued for two meetings following the April 19, 2002 meeting until shortly after the submission of the Seventh Report of the Court Monitor ("Seventh Report").

E. The Extent of the Dialogue Between the Deputy Secretary and the Court Monitor

The Court Monitor's attendance at the April 19, 2002 meeting was not an isolated event. Even a cursory review of the invoice summaries submitted by the Court Monitor demonstrate that there had been numerous meetings between the Deputy Secretary and the Court Monitor. The invoice summaries even provide the date and time the Court Monitor spent with the Deputy Secretary and his key subordinates during a six month time period.[3] The

[3] *See* Plaintiffs' Consolidated Opposition To Interior Defendants' Motion To Revoke The Appointment Of Joseph S. Kieffer, III And To

(Continued on following page)

Court Monitor met with Mr. Griles on at least twenty occasions for approximately thirty hours. While it is not the Court's intention to compound the violation of the confidential ex parte nature of these discussions (as was done by the Deputy Secretary and his subordinates when they filed their declarations), suffice it to say that those discussions, reported to this Court by the Court Monitor, ranged far and wide on the trust reform efforts of Mr. Griles, as the Secretary's appointed "man in charge" of trust reform. As with Mr. Rossetti, the Court Monitor, at the request of the Deputy Secretary, described the reviews he conducted of the progress of trust reform and the historical accounting and answered all questions posed by the Deputy Secretary and his key subordinates about their plans and operations regarding these matters. While not specifically identifying the subject matter of those discussions here, the Court was aware that they involved matters that later became the subject of the Court Monitor's Fifth (the historical accounting), Sixth (the Eighth Quarterly Report), and Seventh (the Special Trustee) Reports to the Court. Also during this same period, the Secretary's proposed Bureau of Indian Trust Asset Management (BITAM) was under formation and review at Interior and was and is also a subject of the Court Monitor's continuing review.

That the Deputy Secretary wanted this dialogue outside of the prying eyes of the Court or, of more concern, the plaintiffs, and reiterated his interest in it is no better exemplified than in his own testimony during the contempt trial of the Secretary and Assistant Secretary for

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Clarify The Role Of Court Monitor And Opposition To Defendants' Motion To Not Pay Mr. Kieffer's Fees at Plaintiffs Exhibit 1, page 28.

Indian Affairs in February 2002. During his testimony, this Court inquired of the Deputy Secretary just how outsiders could monitor trust reform within the DOI and referred to the Court Monitor's role. Mr. Griles responded:

> . . . I think that we would rather not be in an adversarial role with the Court Monitor. If he has got concerns, let me know what they are and if I can't fix them and resolve them and he thinks he's not getting the facts, tell me what they are. I will deal with them.
>
> What we end up doing is having to respond to the Court Monitor's report because the next thing we know, we will have somebody in contempt of court. That's not in the best interest of you, the Department and of the Court Monitor. And so that's our frustration, I guess, with the process.

Contempt II Tr. at 4179-4180.

Mr. Griles was fully aware at the time of his testimony that this Court had already authorized, at his request, the Court Monitor to do exactly what he wanted: tell him of the Court Monitor's concerns and what the Court Monitor planned to report to this Court about those concerns so that Mr. Griles could address and correct the perceived problem or resolve the Court Monitor's concerns.[4]

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[4] Defendants argue in their *Reply To Plaintiffs' Opposition To Interior Defendants' Motion To Revoke The Appointment of Joseph S. Kieffer, III, And To Clarify The Role And Authority Of A Court Monitor,* filed July 11, 2002, that the Deputy Secretary, by making this request, only wanted Mr. Kieffer to inform him of his concerns prior to filing his reports so that "Mr. Griles and other Interior officials could help him"

(Continued on following page)

II. ANALYSIS

The discretion of this Court in considering the sufficiency of a motion to recuse a judicial officer pursuant to 28 U.S.C. Section 455(a), such as the instant motion regarding the alleged actions of the Court Monitor, is broad. *See James v. District of Columbia,* 191 F. Supp. 2d 44 at 46-47 (D.D.C. 2002). Defendants bear the burden of proof to show that the Court Monitor has conducted himself in a manner supporting his disqualification. The Court must begin its analysis of the allegations supporting such a request with a presumption against disqualification. *See Tripp v. Executive Office of the President,* 104 F. Supp. 2d 30 (D.D.C. 2000); *McCann v. Communications Design Corp.,* 775 F. Supp. 1506 (D. Conn. 1991).

The Court finds that the defendants have failed to meet their burden of proof and overcome the presumption against disqualification of Mr. Kieffer. As more fully addressed below, the Court Monitor's activities questioned by the defendants were not inappropriate or beyond his

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and address those concerns themselves; that the Deputy Secretary did not expect the Court Monitor to "employ his position as a judicial officer as a means with which to dictate how the Department of the Interior should be run." *Id.* at 9. Defendants seek to limit the intent of the Deputy Secretary's request made of this Court and expand the conduct of the Court Monitor beyond any role he sought to carry out or did conduct. For over six months the Court Monitor advised the Deputy Secretary of his concerns and the potential substance of his reports regarding his opinion of the status of defendants' trust reform efforts at the *specific* and *continuing* request of the Deputy Secretary. For over six months, including meetings and conversations following the April 19, 2002 meeting, the Deputy Secretary listened to that advice and even thanked the Court Monitor for it. For defendants to attempt to characterize the advice of the Court Monitor as judicial dictates in one of the last meetings during these six months of meetings (which they fail to address at all) would be farcical if it were not so cynical.

authority. To the contrary, those activities addressed in the declarations relied on by defendants were conducted pursuant to the Secretary of the Interior's *own request* to this Court that the Court Monitor inform her through the Deputy Secretary of his concerns with the progress of trust reform and the ongoing activities of defendants to bring about that reform. It was the Deputy Secretary himself who requested the Court Monitor be permitted to engage in a dialogue with him and his senior managers regarding his interest and that of the Secretary in learning of the opinions and concerns of the Court Monitor regarding actions taken by Defendants to bring about both the historical accounting and trust reform or what has become known as "fixing the system."

As the Court Monitor has conducted his activities in conformance with the Orders of the Court, there is no cause for this Court to revoke the Court Monitor's appointment. In light of the Memorandum Opinion issued this date regarding the five civil contempt specifications, the remaining issues raised by defendants in their motion are now moot. Accordingly, the Court will not address them.

A. The April 19, 2002 Meeting

The peg on which defendants seek to hang their motion to revoke the appointment of the Court Monitor is that his conduct, mainly at the April 19, 2002 meeting, was an assumption of powers that exceeded in some manner his authority and the constitutional and statutory bounds of the jurisdiction of this Court. Defendants contend that his words to them during the meeting prove that the Court Monitor sought to exercise control over the

Interior Department to bend it to his (or, inferentially, this Court's) will. In their words, he had attempted to influence improperly the parties to the meeting; had issued an "ultimatum" to the defendants; had "chosen sides" with the Special Trustee; and threatened that if they did not follow his direction, they would suffer "unpleasant consequences" including the publication of the "Seventh Report criticizing their treatment of the Special Trustee." *See* Revocation Motion at 8.

The declarations on which these allegations are based utterly fail to report accurately the facts surrounding the reason the Deputy Secretary requested the Court Monitor's attendance at this meeting, the circumstances under which he was authorized by this Court to participate in the meeting, and the reasons for the continuing dialogue about the Special Trustee that was held with the Deputy Secretary before, during, and after the meeting. Once again, as he had done at the beginning of the dialogue between the Deputy Secretary and the Court Monitor that started in November 2001, the Deputy Secretary requested that this Court authorize the Court Monitor's attendance at this meeting; a fact completely unreported in his description of the meeting and the reasons for it. This was not the first meeting with the Deputy Secretary at which the Court Monitor had addressed his concerns regarding the ongoing dispute between the Secretary, the Deputy Secretary, and the Special Trustee about the latter's reporting channels, alleged performance failures, professional concerns about the progress of trust reform, the strategic plan, and the inability of the defendants to conduct a proper historical accounting. To the contrary, the Court Monitor had informed the Deputy Secretary, as he later stated in the Seventh Report, that this Court had

expressed interest in knowing of the role that the Special Trustee would play in the Secretary's planned reorganization of the Department of the Interior under the BITAM proposal. For that reason, if no other, the Court Monitor would be reporting on the Special Trustee's ongoing role in overseeing and advising the Secretary on trust reform carried out under the direction of the Deputy Secretary.

This Court has given serious consideration to hearing testimony on the instant motion to include that of the Court Monitor and the former Special Trustee to fully document the six month history of meetings between the Court Monitor and the Deputy Secretary, always at the latter's request, and the uses to which the Deputy Secretary may have improperly attempted to bend the good will efforts of the Court Monitor to defendants' own benefit. However, the Court is personally aware of the background of the April 19, 2002 meeting, the conversations at that meeting and at the subsequent meetings between the Deputy Secretary and the Court Monitor. Contemporaneous reports by the Court Monitor to the Court and the public record are sufficient to avoid the necessity of lifting the ex parte veil from these meetings any further than it has been torn by the words of the Deputy Secretary in his declaration and those of his subordinates in theirs.

There is a simple truth regarding the Court Monitor's participation in and presentation at this meeting. In several meetings prior to the April 19, 2002 meeting, the Court Monitor apprised the Deputy Secretary that there was a dispute developing between the Secretary and the Special Trustee (with a central role being played by the Deputy Secretary in threatening to fire the Special Trustee) regarding the appropriate role of the Special Trustee. The Court Monitor had also alerted the Deputy Secretary

that he had planned, before learning of this dispute, to submit a Report of his review of the Special Trustee's role in the trust reorganization underway within the Interior Department. That review would have to include this dispute if it were not resolved. The Deputy Secretary was the person that requested the Court Monitor meet with both the Special Trustee and him to discuss the issue.

B. Court Authorization For The Court Monitor To Attend And Participate In The April 19, 2002 Meeting

The Court is aware of the substance of these meetings concerning the Special Trustee and of the meeting held by the Deputy Secretary with the Court Monitor the day before the April 19, 2002 meeting. The Court Monitor had agreed to attend the latter meeting at the request of the Deputy Secretary *only* if this Court authorized that attendance and approved the role the Deputy Secretary asked the Court Monitor to undertake during the April 18, 2002 meeting. Based on a review with the Court Monitor of the presentation of the facts surrounding the request of the Deputy Secretary at the prior meeting, his pledge to honor the previous ex parte agreement with the Court Monitor, and that he would provide notice to and receive agreement from defendants' counsel that the meeting could take place in the manner requested, without the attendance of counsel, this Court authorized the Court Monitor to honor the Deputy Secretary's request and attend and participate in the meeting.

The Court Monitor did not have an improper role at the April 19, 2002 meeting attended by the Deputy Secretary and the Special Trustee (and their subordinates). Indeed, the role of the Court Monitor at that meeting was

one that was requested by the Deputy Secretary and authorized by this Court. By all accounts, it was a heated meeting and resolved nothing. As subsequently reported by the Court Monitor in the Seventh Report, defendants were unwilling to fully accept the Congressionally-mandated role of the Special Trustee whose main responsibility was to oversee and report to Congress and advise the Secretary on the status of, problems with, and solutions to the Interior Department's trust reform activities.

This Court was aware that this April 19, 2002 meeting was another meeting in a series of meetings, both before and after it, at which the Court Monitor expressed his concerns to the Deputy Secretary about the actions of the Secretary and the Deputy Secretary regarding the Special Trustee as the Deputy Secretary had requested him to do. The only difference with this meeting was the presence of the Special Trustee and his Principal Deputy and the objective of the meeting as established by the Deputy Secretary. Defendants have attempted to portray the purpose of the role and objectives of the Court Monitor during this meeting into something other than what they were.

What is most troubling to the Court about the defendants' motion and attached declarations is that they have taken a good faith effort on the part of this Court to provide a unique opportunity to the Secretary of the Interior, at her request, and twisted that effort into an inappropriate and unwarranted attack on the Court Monitor and, undeniably, this Court. The Court sought to allow the defendants to receive the benefit of the views of the Court's own monitor prior to his reporting publicly about them to this Court. The Secretary's request to receive the advice of the Court Monitor about his review of

defendants' trust reform planning and operations, as relayed to the Court by the Deputy Secretary in November 2001, was believed by this Court to be worth granting if any further failures or delays in the Secretary's trust reform efforts could be corrected or avoided for the benefit of the defendants' trust reform efforts, the plaintiffs, and, indirectly, all Indian Trust beneficiaries.

The results of granting the Secretary's request and allowing the Court Monitor to hold a six-month ex parte dialogue with the Deputy Secretary and his subordinates are typified by the disingenuous compilation of allegations against the Court Monitor concerning his conduct at one of these meetings. Defendants' unsuccessful attempt to discredit the Court Monitor similar to so many of the defendants' trust reform Quarterly Reports, fails of its own mendacity. Defendants waited until the very last moment after a six-month dialogue between the Court Monitor and the Deputy Secretary to claim that the Court Monitor's conduct at one meeting of over twenty hour-plus meetings was inappropriate and beyond his authority.

Having failed to address these meetings or their involvement in initiating them, defendants will not now be heard to claim the role of the Court Monitor was anything other than what the Deputy Secretary stated he wanted it to be in November 2001 and later in April 2002 at the time of the subject meeting. The declarations' descriptions of the Court Monitor's statements, whether actually made, taken out of context, or invented, when placed in the proper context of the purpose of the meeting called by the Deputy Secretary, reveal no more than the efforts of the Court Monitor to apprise the Deputy Secretary in the presence of the Special Trustee of the obvious risks faced by the defendants in this litigation and the additional

concerns he had regarding the Secretary's disagreements with the Special Trustee's opinion of the status of trust reform and the Special Trustee's own role to oversee, report on, and correct it. His presentation and comments appear to be an effort to set the stage to convince the parties attending the meeting to find some way to work together rather than continue the internecine warfare patently obvious in their own dueling memoranda included with the Seventh Report of the Court Monitor.[5]

That the Deputy Secretary continued to meet with the Court Monitor and discuss the issues surrounding the Special Trustee *after* the April 19, 2002 meeting, also unreported by Mr. Griles in his declaration, weighs against attaching any weight to the veracity of the Deputy Secretary's declaration.

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[5] The Office of the Inspector General, Department of the Interior, has reported on this warfare in its *Report: Allegation Concerning Conduct of Department of the Interior Employees Involved in Various Aspects of the Cobell Litigation,* submitted by defendants to this Court. *See* Defendants' Notice of Filing, August 5, 2002. In the Executive Summary to that Report, the Office of the Inspector General noted in its Conclusion: "Having had oversight responsibility for more than two decades, the Office of Inspector General benefits from having a unique historical perspective of the Department as an institution. During our years of oversight, we have often observed that the components of the Department have no history of, and no particular incentive to, work together." *Id.* at 6. Further, "The Office of Inspector General has seen this 'bunker mentality' display itself time and again. The pattern here is the same – begin by protecting one's own Bureau or office, to the detriment of other Bureaus or offices if necessary; then protect the Department, and/or the institution or position it has advanced; finally, protect the public interests for which the Department is responsible, in this case those of Individual Indian Trust account holders." *Id.* And, finally, with respect to the Office of Special Trustee and the Bureau of Indian Affairs: "Finally, the friction between BIA and OST is particularly noteworthy. So long as it continues, we fear little meaningful progress will be made in the arena of Indian Trust reform." *Id.*

Although the Court Monitor was able to accomplish little as he sought to apprise the Secretary and Deputy Secretary of his concerns to enable them to better carry out defendants' trust reform fiduciary obligations during the six months the Court Monitor assented to the Deputy Secretary's requests, the Court Monitor's efforts appear to be honorable, well-intentioned, and always at the direct request[6] of the Deputy Secretary. The Court Monitor's conduct appears to the Court to have been professional, appropriate, and within his authority granted by this Court. His specific involvement at the April 19, 2002 meeting was based on the authorization of this Court on April 18, 2002 – at the specific oral request of the Deputy Secretary. That the Deputy Secretary chose to waste this unique opportunity to have the benefit of this ex parte dialogue with the Court Monitor, having fervently requested it from this Court; and to characterize it as something it was not is stark testimony to the defendants' lack of integrity brought by them to not only their legal

[6] Assuming, as the Court does for the purposes of this motion, that, as the April 19, 2002 meeting was about to commence, the Deputy Secretary asked that it be cancelled, any statement made by the Court Monitor that it would be in the defendants' interests not to cancel is understandable. The Court Monitor had just obtained the day before this Court's authorization at the request of the Deputy Secretary to attend the meeting and attempt to facilitate a resolution of the continuing dispute between the Secretary, the Deputy Secretary, and the Special Trustee to obviate the necessity of filing a Report addressing this major stumbling block facing the Secretary in her efforts to make progress with trust reform. In light of the major problems facing the defendants in their trust reform efforts that had been observed by the Court Monitor over the period of his meetings with the Deputy Secretary, one more example of the defendants' unwillingness to work out one of their major problems regarding the Special Trustee's role and opinions regarding the lack of trust reform progress would have given this Court another example of that recalcitrance.

and ethical obligations to this Court but to their conduct of their fiduciary obligations to the American Indian and specifically the IIM account holders, the plaintiffs in this litigation.

C. Other Allegations Of Misconduct

1. The Seventh Report

Defendants attempt to cobble together an argument that the Seventh Report, that mainly addresses the correspondence between the Secretary and the Special Trustee highlighting the inability of the Secretary, or her advisors, to understand or appreciate the role of the Special Trustee, intruded on the internal affairs of the defendants rather than just report on the Interior's trust reform activities. *See* Motion in Support of Revocation Motion at 13. In making this argument, defendants overlook the role of the Special Trustee as established by Congress in the Indian Trust Fund Management Act of 1994. *See* Pub.L. No. 103-412 (1994) (1994 Act). The position of Special Trustee was established, as this Court stated in its December 21, 1999 Memorandum Opinion: "Because Congress recognized that Interior's pattern of historic failures could not be allowed to continue, the (1994 Act) established within the Interior the Office of the Special Trustee for American Indians. To advise the Secretary and to help oversee defendants' trust management practices . . ." *Cobell v. Babbitt,* 91 F. Supp. 2d 1 (D.D.C. 1999) at 13. Reporting on the role played, or not played, by the Special Trustee clearly fell within the appointment order of the Court Monitor.

The Court Monitor's review and the Seventh Report addressed the role given, or not given, to the Special

Trustee by the Secretary and the Special Trustee's concerns about this role and his inability to perform his proper functions assigned to him by Congress. This Court wanted to know, as it attempted to determine during the Secretary's contempt trial without success, what the Secretary planned to do to ensure that the Special Trustee was appropriately involved in the planned reorganization and that she and the Congress had unfettered access to the candid and unobstructed advice and opinions of the Special Trustee through his oversight responsibilities. The Special Trustee is no longer with us to give Congress and this Court those opinions. But the Seventh Report documented his recent concerns about the lack of trust reform progress and his belief that the defendants could not conduct an adequate and complete historical trust accounting and the potential reasons why he may no longer be among the participants in the defendants' trust reform efforts.

2. Task Force on Management Reform-Tribal Task Force Meeting, May 20, 2002

The defendants also portray the Court Monitor's attendance and limited participation in the meetings of the Tribal Task Force as somehow offering himself as a "fact witness" biased in favor of the Special Trustee and against the Secretary and her immediate staff. *See* Memorandum in Support of Revocation Motion at 20-21.

The Court Monitor's attendance at the Tribal Task Force meetings was and is within his authority to monitor the progress of trust reform. The defendants announced to this Court in November 2001, with much fanfare, that they were in the process of reorganizing the Interior Department to create a trust organization separate and

apart from the Bureau of Indian Affairs (BIA) – The Bureau of Trust Asset Management (BITAM). BITAM, not unlike TAAMS before it, touted by the last Interior Department administration as the panacea for trust reform, was the response of the defendants to not only the reports of the Court Monitor but also of their own contractor – Electronic Data Systems – who reviewed the trust reform efforts of the BIA and reported their failures and needed corrections in a series of reports that defendants submitted to this Court.

Recently, in their *Status Report to the Court Number Ten,* at page 5, defendants have informed this Court that, not unlike the TAAMS initiative, this Secretary has withdrawn the BITAM proposal as a means for carrying out the fiduciary trust obligations of defendants. What oversight and supervisory organizations and fiduciary trust structures will be created in its place? There is no strategic plan, no trust organization, and no business, computer, or personnel management systems to carry out trust reform or conduct sound fiduciary trust operations. Defendants are still attempting to determine what they are doing presently about trust reform and trust operations nationwide. Consultation with the Indian Tribes represented by the Tribal Task Force is now the focus of the trust reform reorganization. Whether this consultation process will result in a new trust organization that can meet the fiduciary trust standards required of defendants is questionable at this time and remains unanswered by defendants. The Court Monitor has appropriately attended these meetings and observed their progress to be able to address these questions and many others with the defendants' employees and Tribal representatives involved in

these monthly consultations. Indeed, Secretary Norton herself raised this issue during the contempt trial.

The Court Monitor has presented an update of his activities to the Tribal Task Force membership at their leadership's request at each meeting he has attended. To read portions of his Reports to the Court to the membership or comment on those reports and the activities of the defendants described in them is not a showing of bias but an expression of his opinions well documented in his reports to this Court. It appears that any negative comments about defendants' activities or even positive comments about the Secretary's subordinates, if expressed by the Court Monitor, will be interpreted by defendants as bias with some convoluted interpretation of their factual significance or legal effect upon the litigation. Defendants, in their efforts to discredit the Court Monitor, are grabbing at factual straws and legal sparks in a fruitless attempt to make a disqualification bonfire.

3. The Seventh Report's Release of "Privileged" Documents

Defendants claim privilege over six documents submitted by the Court Monitor in his Seventh Report. They allege that he, in some manner, has violated defendants' fundamental right to communicate with their counsel by releasing these alleged privileged documents. The Court Monitor obtained these documents from DOI officials pursuant to his authority under Court Orders and the Secretary's own memorandum's direction. No claim of privilege accompanied that release or he would have so indicated to this Court. Whether or not these officials failed to properly advise the Court Monitor of any privilege they believed might attach to any of the documents is of no

moment in answering the allegation that the Court Monitor has acted improperly in publicly releasing them. The Court Monitor included and discussed some of these documents and others in his Seventh Report to the Court. The Court Monitor obtained them pursuant to this Court's Orders appointing him to his position. The Secretary, in her April 24, 2001 memorandum, announcing the appointment of the Court Monitor, had also directed that the Court Monitor have access to all records within her control. It was the defendants' duty to properly advise the Court Monitor of any claims of privilege. They do not appear to have done so.

The Court also notes that the Special Master has held that the attorney/client and deliberative process privileges and work-product doctrine cannot be asserted by a trustee to shield disclosure from trust beneficiaries information regarding the management and administration of the trust. Defendants have not contested that decision before this Court. *See Opinion of Special Master,* dated May 11, 1999, at 10-11.

III. CONCLUSION

Defendants have sought the Court Monitor's disqualification pursuant to 28 U.S.C. Section 455(a), which states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Defendants have failed to meet that standard in their unwarranted and meretricious allegations against the Court Monitor. Accordingly, it is hereby

ORDERED that the defendants' Motion To Revoke The Appointment Of Joseph S. Kieffer, III, And To Clarify

The Role And Authority Of A Court Monitor [1339-1] [1339-2] is DENIED.

SO ORDERED.

Date: 9-17-02

Royce C. Lamberth

United States District Court

ELOUISE PEPION COBELL, et al., Plaintiffs, v. GALE A. NORTON, Secretary of the Interior, et al., Defendants.

Civil Action Number 96-1285 (RCL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

223 F. Supp. 2d 156; 2002 U.S. Dist. LEXIS 18178

September 30, 2002, Filed

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For Kenneth F Rossman, MOVANT: Christopher B Mead, London & Mead, Washington DC, USA.

Albert Lee Bynum, MOVANT, Pro se, Gadsden AL, USA.

For Albert Lee Bynum, MOVANT: Nathaniel Davis Owens, Sr., Anniston AL, USA.

For Intertribal Monitoring Association for Indian Trust Funds, MOVANT: Jill Elise Grant, Washington DC, USA.

For Native American Industrial Distributors, Inc, MOVANT: Neil James Ruther, Towson MD, USA.

JUDGES: Royce C. Lamberth, United States District Judge.

OPINION BY: Royce C. Lamberth

OPINION:

MEMORANDUM AND ORDER

This matter comes before the Court on four of defendants' motions for adjustment or reconsideration of requests by the Court Monitor (now Special Master-Monitor)

for compensation.[1] Because the motions and supporting memoranda are nearly identical in their factual statements and arguments, the Court will address all four in this Memorandum and Order.

Defendants provide three grounds for their requests for adjustment or reconsideration:

> (1) Defendants were not provided with an opportunity to review and object to the Court Monitor's compensation requests prior to the issuance of the Court's orders for payment;
>
> (2) The compensation requests were not reasonable or proper because they failed to provide sufficiently detailed information about the work performed by the Court Monitor; and
>
> (3) The compensation requests were not reasonable or proper because the Court Monitor included charges for activities and expenses that were beyond the scope of his appointment order and beyond the jurisdiction of this Court.

The Court will examine each of these grounds in turn.

Initially, the Court notes that defendants raised no complaints or challenges to the compensation requests submitted by the Court Monitor for over a year after his initial appointment. Defendants' first such complaint was

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[1] Interior Defendants' Motion for Reconsideration of the May 31, 2002 Order to Pay the Court Monitor the Sum of $ 54,307.34, filed on June 14, 2002; Interior Defendants' Motion for Adjustment of the June 2002 Compensation Request of the Court Monitor, filed on July 17, 2002; Interior Defendants' Motion for Adjustment of the July 2002 Compensation Request of the Court Monitor, filed on August 6, 2002; and Interior Defendants' Motion for Adjustment of the Court Monitor's August 2002 Compensation Request, filed on September 24, 2002.

filed on June 14, 2002, the same day that defendants filed their motion to revoke the Court Monitor's appointment. It hardly seems a wild surmise, then, that defendants' challenge to the Court Monitor's compensation request likely has more to do with furthering the objectives of defendants' motion to revoke the Court Monitor's appointment than with any dispute about a particular fee or expense item requested.

Defendants point to no authority for the assertion that they are entitled to comment upon or object to the Court Monitor's compensation requests prior to the Court's issuance of an order to pay. *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994), which is cited by defendants, certainly stands for no such proposition. Instead, it contains only the following unremarkable dictum at the very end of the opinion: "In any event, it would be unfair to order Defendants to pay the fees without an opportunity to object." *Id. at 1270.* In fact, this Court has afforded defendants an opportunity to object to the Court Monitor's compensation requests – it has allowed for a response to the requests following payment, and it has established a method for adjustment of the amounts paid in the next compensation request filed by the Court Monitor. Defendants thus cannot be heard to complain that they have not been entitled to an opportunity to contest the Court Monitor's requests for compensation.

Next, defendants object to the reasonableness and propriety of the compensation requests, alleging that the requests do not provide sufficient details regarding the work performed by the Court Monitor. Defendants point to a dissenting opinion in *Texas v. New Mexico*, 475 U.S. 1004, 89 L. Ed. 2d 360, 106 S. Ct. 1168 (1986), as support for their position. The complaint in that case, however,

concerned a fee statement by a special master who had provided neither his hourly rate nor the experience levels of the attorneys for whose services he was charging. Id. Neither of these facts is, of course, present in the instant case. Nor does Justice Blackmun's paragraph-long opinion in *Kansas v. Colorado*, 498 U.S. 933, 934, 112 L. Ed. 2d 301, 111 S. Ct. 335 (1990) do much to advance defendants' argument. That opinion merely asserts, in dicta, that a court should determine for itself the reasonableness and propriety of a special master's requests for compensation. As noted below, this Court has determined that the Court Monitor's requests are both reasonable and proper.

Defendants also quote from two opinions involving "analogous circumstances" – namely, awards of attorneys' fees to a prevailing party – in an attempt to justify their objections. The first of these two opinions happens to be a 1999 memorandum opinion from the instant case. This Court can only respond that the devil himself may quote scripture to his purpose. In any event, neither opinion applies in the instant case because they address the very different situation in which a prevailing party submits a proposed fee bill to the court. Such a situation calls for scrutiny from an adverse party because of the opportunity for fraud by the party submitting the bill, who is not subject to scrutiny by the court. The opinions that defendants cite are inapposite here because the Court Monitor is not an adversarial party, and because both the Court Monitor's activities and his compensation requests are subject to monthly review by this Court. The Court Monitor's experience and expertise, documented upon his appointment and confirmed by his submission of eight Reports to this Court as well as several supplemental and special reports, gainsay any allegation that he has not

conducted himself in a proper manner. The overall amount of each of the Court Monitor's compensation requests has been reasonable, and has represented a reasonable amount of time expended in performance of his duties. Moreover, the hourly rate at which the Court Monitor bills his time is far below the market rate for an attorney of his vast experience.

Defendants also overlook the fact that the Court's order appointing the Court Monitor, as well as the order extending his appointment, authorized him to "receive ex parte communication with all entities necessary or proper to effectuate his duties." See Orders dated April 16, 2001 and April 15, 2002. This Court has authorized the Court Monitor to hold in confidence the identity of such entities, as well as the substance of any statements made by their employees to him. It would be manifestly improper for the Court Monitor's compensation requests to violate such confidences by naming the persons with whom he has met or describing the nature of their conversations. It is sufficient that the Court Monitor has advised this Court regarding his meetings and discussions with third parties and has always informed this Court about the nature, extent, and substance of such meetings and discussions upon request. To provide defendants access to information about the Court Monitor's discussions regarding defendants' trust reform activities, including the names of persons with whom he conducts such discussions, would allow defendants to influence or control the information that the Court Monitor receives. Defendants understood this problem when they consented to the Orders appointing the Court Monitor and the extension of that appointment.

This Court has already addressed concerns about retaliation based on defendants' conduct toward their own employees who have made public statements or who have assisted this Court's investigating officials. That concern has again surfaced in the reasons that the Special Trustee provided for his resignation, including allegations that he was forced to resign by the Secretary of the Interior because of statements that he made to the Court or to Congress. This Court drafted the ex parte language in the orders appointing the Court Monitor and extending his appointment for the express purpose of preventing any renewed retaliatory action in conjunction with his monitoring activities. The Court Monitor was required to remain independent of any control by defendants or their surrogates so as not to impair his ability to conduct his investigation.

In order to provide defendants with the assurance that the Court Monitor's fees are reasonable and proper, this Court has performed an independent determination of the Court Monitor's compensation requests that have been called into question by defendants. The Court is satisfied that all four requests have been properly made. Defendants have presented no evidence to suggest that any individual fees or expenses requested by the Court Monitor are questionable in nature. Without such evidence, this Court's determination will not be disturbed.

Finally, defendants claim that the Court Monitor's invoice includes fees and charges for activities that are not properly within the scope of his appointment order or within this Court's jurisdiction. Specifically, defendants contest all charges related to the issuance of formal discovery requests, to legal research, and to expenses for attending the InterTribal Monitoring Association meeting

as beyond the scope of the Court Monitor's appointment order. The Court initially notes that it was defendants' concern that the Court Monitor's activities be governed by *Rule 53 of the Federal Rules of Civil Procedure* that led this Court to require "that to the extent the Court Monitor's findings of fact submitted to the Court are based upon witness statements, those statements should be developed from on-the-record testimony given under oath with an opportunity for cross-examination by the parties." See Order dated April 15, 2002. Defendants will not now be heard to argue that the issuance of discovery requests by the Court Monitor, which give effect to this very language, are beyond the scope of his appointment order. Additionally, the Court notes that the Court Monitor had been ordered to include in his reports "a summary of the defendants' trust reform progress and any other matter Mr. Kieffer deems pertinent to trust reform." Id. The performance of legal research is unquestionably within the scope of the Court Monitor's mandate, as is his attendance at a meeting of a consortium of American Indian tribes to discuss trust fund issues. However, defendants challenge this very mandate as beyond this Court's jurisdiction. On this subject, defendants would be mindful to recall the words of the D.C. Circuit in response to similar assertions:

> The level of oversight proposed by the district court may well be in excess of that countenanced in the typical delay case, but so too is the magnitude of government malfeasance and potential prejudice to the plaintiffs' class. Given the history of destruction of documents and loss of information necessary to conduct an historical accounting, the failure of the government to act could place anything approaching an adequate accounting beyond plaintiffs' reach. This fact,

> combined with the longstanding inability or unwillingness of government officials to discharge their fiduciary obligations, excuse court oversight that might be excessive in an ordinary case.

Cobell v. Norton, 345 U.S. App. D.C. 141, 240 F.3d 1081 (D.C. Cir. 2001).

The four motions presently before the Court, which represent a continued campaign against an official of this Court, seem designed as part of a concerted effort to interfere with the Court's oversight function. It is certainly understandable that defendants might behave in this manner. The Court Monitor's reports, after all, have proved embarrassing to defendants, documenting as they do their many falsehoods and attempts to mislead this Court. But it is time for such behavior to end. For defendants to file their latest motion for adjustment only one week after this Court's contempt ruling simply demonstrates that defendants have no intention of ever reexamining their bunker mentality that their own Inspector General has criticized as destructive.

Having made a thorough review of the Court Monitor's compensation requests to which defendants have objected, this Court is satisfied that the compensation requests were properly submitted and are unobjectionable. Accordingly, it is hereby

ORDERED that Interior Defendants' Motion for Reconsideration of the May 31, 2002 Order to Pay the Court Monitor the Sum of $ 54,307.34, Interior Defendants' Motion for Adjustment of the June 2002 Compensation Request of the Court Monitor, Interior Defendants' Motion for Adjustment of the July 2002 Compensation Request of the Court Monitor, and Interior Defendants'

Motion for Adjustment of the Court Monitor's August 2002 Compensation Request be DENIED.

SO ORDERED.

Royce C. Lamberth

United States District Judge

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate [magistrate judge]

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate [magistrate judge], bankruptcy judge, spouse or minor

child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

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April 30, 2001

Invoice #10018

Professional services

		Hrs/Rate	Amount
3/28/01	Review and draft/edit response to Defendants' Motion for Clarification	4.20 200.00/hr	840.00
	Review materials relevant to defendant's motion for clarification; draft/edit responsive memo	1.60 200.00/hr	320.00
3/29/01	Draft/edit memo on motion for clarification	1.20 200.00/hr	240.00
3/30/01	Research for memo on IMDA privilege	0.40 200.00/hr	80.00

4/2/01	Finalize Monthly Report	1.20 200.00/hr	240.00
4/2/01	Review Plaintiff's Motion to Investigate OIRM	0.40 200.00/hr	80.00
	Review Ferrell letter of 3/30 regarding auditor's report	0.10 200.00/hr	20.00
	Review Ferrell letter regarding destruction of documents in Omaha; draft Report and Recommendation regarding Motion for Withdrawal or Modification	1.20 200.00/hr	240.00
	Review March 30, 2001 letter of S. Himmelhoch regarding Attachment B to the Subpoena Duces Tecum	0.50 200.00/hr	100.00
	Review Holcomb letter revealing document destruction at El Paso branch; Dwyer letter concerning destruction at San Francisco	0.60 200.00/hr	120.00
	Review documents regarding OTR investigation	5.70 200.00/hr	1,140.00
	Draft/edit memo re: motion to clarify	0.30 200.00/hr	60.00
4/3/01	Review Hantavirus materials forwarded by UNM; conference w/UNM biologist Dr. Terry Yates	2.80 200.00/hr	560.00
	Research case law and articles related to civil contempt	2.20 200.00/hr	440.00
4/4/01	Research IMDA privilege	1.70 200.00/hr	340.00

4/4/01	Review OTR discovery responses	3.90 200.00/hr	780.00
4/5/01	Review/Revise SEG research memo on IMDA privilege	0.70 200.00/hr	140.00
	Review OTR documents	5.80 200.00/hr	1,160.00
4/6/01	Review research; draft/edit IMDA order	1.20 200.00/hr	240.00
4/9/01	Meeting & Conferences w/Court and counsel	3.60 200.00/hr	720.00
	Review Himmelhoch letter requesting UNM info etc. and draft letter in response	0.20 200.00/hr	40.00
	Research legislative history of IMDA and other acts controlling proprietary information	1.60 75.00/hr	120.00
	Review site visit reports and compare with field notes; draft chart on same	4.20 75.00/hr	315.00
	Review budget materials/plaintiffs documents related to budget regarding OTR investigation	4.40 200.00/hr	880.00
4/10/01	Document Review for OTR investigation	6.00 200.00/hr	1,200.00
4/11/01	Draft Report and Recommendation regarding Motion for Modification of NOFRD Report; research issues relating to governmental character of Federal Reserve Banks	6.60 200.00/hr	1,320.00
	Review and assist Court in drafting appropriate language	1.20 200.00/hr	NO CHARGE

	Research protected status of proprietary information	3.10 75.00/hr	232.50
4/12/01	Finalize draft of NOFRB Report	3.50 200.00/hr	700.00
4/13/01	Organize documents related to OTR investigation	3.80 75.00/hr	285.00
	Draft letter to Terry Yates re: Hantavirus	0.30 75.00/hr	22.50
	Begin index of Tier III Documents	2.40 75.00/hr	180.00
4/15/01	Finalize Report regarding NOFRB	4.60 200.00/hr	920.00
	Attend two conferences with court regarding Kieffer appointment	2.00 200.00/hr	NO CHARGE
	Review final case laws regarding Treasury and Fed; review correspondence regarding document destruction in Chicago	2.50 200.00/hr	500.00
4/16/01	Attend status conference	1.00 75.00/hr	75.00
	Continue Tier III index	5.30 75.00/hr	397.50
	Edit Report & Recommendation re: Federal Reserve Banks	0.60 75.00/hr	45.00
	Review OTR documents produced in response to subpoena	4.30 200.00/hr	860.00
4/17/01	Finalize report and recommendation	1.50 200.00/hr	300.00

	Assist Mr. Kiefer in locating documents for review	0.60 75.00/hr	45.00
	Continue Tier III Index	7.20 75.00/hr	540.00
	Review OTR documents produced in response to subpoena	3.80 200.00/hr	760.00
4/18/01	Review letter from Swanson to Findlay and attachments regarding records at Northern Cheyenne	0.20 200.00/hr	40.00
	Review and analyze Iron Mountain contract; draft memo to file	1.40 200.00/hr	280.00
	Review supplemental report regarding Cleveland Fed and Charlotte Fed; Portland	0.20 200.00/hr	40.00
	Review Bi-Weekly Report	0.30 200.00/hr	60.00
	Review CDC article on Hantavirus infection provided by UNM	0.60 200.00/hr	120.00
	T/conference w/Dr. Terry Yates regarding hantavirus exposure at agency offices and with Stuart Hamley at Ontrack regarding e-mail backup takes	0.60 200.00/hr	120.00
	Review Christie memoranda	0.20 200.00/hr	40.00
	Draft Letter to S. Himmel-hoch regarding modification to UNM agreement	0.20 200.00/hr	40.00

	Review submissions from "Mole 43"	0.60 200.00/hr	120.00
	Draft Proposed Order regarding Treasury interim responsibility regarding documents in the control of the Fed.	0.60 200.00/hr	120.00
	Finalize Treasury/Fed Order, conference w/counsel	1.80 200.00/hr	360.00
	Continue Tier III Index	4.30 75.00/hr	322.50
4/19/01	Draft Mona Infield Clarification Opinion	3.00 200.00/hr	600.00
	Continue Tier III Index	5.30 75.00/hr	397.50
	Review research and revise opinion on motion for clarification	3.20 200.00/hr	640.00
	Review research on motion to modify protective order; draft/edit report on same	1.30 200.00/hr	260.00
4/20/01	Draft Opinion regarding Motion for Clarification regarding Mona Infield	2.80 200.00/hr	560.00
	Review correspondence from "moles" in field	1.50 200.00/hr	300.00
	Review new site visit reports and OTR Monthly Report; add information to charts	3.20 75.00/hr	240.00
	Review record and draft/edit insert for motion for clarification	0.60 200.00/hr	120.00
	Draft/edit report re motion to modify protective order	2.90 200.00/hr	580.00

4/21/01	Finalize opinion regarding clarification of Infield decision	3.60 200.00/hr	720.00
	Review documents in preparation for Great Plain Region superintendents' meeting in Aberdeen, South Dakota	4.40 200.00/hr	880.00
4/22/01	Travel to Minneapolis and Aberdeen; review documents relating to site visits to Great Plains regions and Regional Director correspondence	2.40 200.00/hr	480.00
4/23/01	Continue Tier III index	7.40 75.00/hr	555.00
	Travel to Eagle Butte, SD and Lower Brule, SD agencies; confer with Superintendents and staff regarding OTR; draft memo regarding findings	5.00 200.00/hr	1,000.00
4/24/01	Continue Tier III index	6.50 75.00/hr	487.50
4/25/01	Continue Tier III index	5.10 75.00/hr	382.50
	Travel to DC; conference w/Winnebago superintendent	5.00 200.00/hr	NO CHARGE
4/26/01	Begin drafting monthly report	2.20 75.00/hr	165.00
	Continue Tier III Index	1.20 75.00/hr	90.00
4/27/01	Finalize Infield Opinion	2.60 200.00/hr	520.00
4/29/01	Review OTR documents produced in response to subpoena	3.50 200.00/hr	700.00

4/30/01	Review Reply in support of Interior's Motion to Modify Attachment B	0.40 200.00/hr	80.00
	Draft Monthly Report	1.40 200.00/hr	280.00
	Review OTR documents produced in response to subpoena	3.50 200.00/hr	700.00
	For professional services rendered	199.00	$29,997.50
	Additional charges:		
4/2/01	Copying cost		366.75
4/5/01	Courier Services		29.87
4/18/01	Annual Storage Fees for Transcripts, court documents and files		596.82
	Courier Services		21.16
	Total costs		$1,014.60
	Total amount of this bill		$31,012.10
	Balance due		$31,012.10

LAW OFFICE
ALAN L. BALARAN
ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE.N.W.
TWELFTH FLOOR
WASHINGTON, D.C. 20006
TELEPHONE (202) 466-5010
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Invoice submitted to:
COBELL V. BABBITT 96-1285
U.S. District Court
333 Constitution Ave., N.W.
Washington DC 20001

May 31, 2001

Invoice #10021

Professional services

		Hrs/Rate	Amount
4/23/01	Analyze Site Visit Reports	0.30 200.00/hr	60.00
	Review Materials and Cases re discovery Issues	2.50 200.00/hr	500.00
4/26/01	Finalize Monthly Report	1.50 200.00/hr	300.00
4/30/01	Continue index of Tier III Documents	6.80 75.00/hr	510.00
	Research protective order issues for IMDA motion	3.20 75.00/hr	240.00
	Draft/Edit Opinion for Protective Order Modification	1.20 200.00/hr	240.00
4/30/01	Research discovery Issues; create outline	2.40 200.00/hr	480.00
5/1/01	Review moving papers regarding Motion to investigate OIRM	1.70 200.00/hr	340.00

	Research and Outline Discovery Issues	1.80 200.00/hr	360.00
	Draft/edit Protective Order Opinion	1.60 200.00/hr	320.00
5/2/01	Review Mcaleb correspondence to Sec. Norton	0.20 200.00/hr	40.00
	Draft Letter to Himmelhoch regarding Preliminary Assessment	0.60 200.00/hr	120.00
	Finish Review of Motion and Opposition to investigate IRM w/attachments	1.80 200.00/hr	360.00
	Draft letter to S. Himmelhoch re: Preliminary Assessment	0.50 75.00/hr	37.50
	Continue Index of Tier III Documents	6.40 75.00/hr	480.00
	Research Discovery and Administrative Law Issues	0.40 200.00/hr	80.00
	Research IMDA legislative history	1.20 200.00/hr	240.00
5/3/01	Draft Recommendation and Report regarding IMDA	2.50 200.00/hr	500.00
	Continue Tier III Index	5.00 75.00/hr	375.00
	Review correspondence between plaintiffs and National Archives	0.30 200.00/hr	60.00
	Legal Research on IMDA Legislative History at Library of Congress; travel to and from same	2.10 75.00/hr	157.50

	Review Ferrell correspondence regarding destruction of docs at Oklahoma City Branch of the Federal Reserve Bank of Kansas City and memo regarding missing boxx at Detroit Branch – memo to file	0.30 200.00/hr	60.00
5/4/01	Review OTR investigation documents	5.00 200.00/hr	1,000.00
	Review defendants reply re: discovery issues	0.40 200.00/hr	80.00
	Review IMDA Legislative History Materials	0.20 200.00/hr	40.00
5/5/01	Continue IMDA research	1.20 75.00/hr	90.00
5/6/01	Review OTR investigation documents	4.60 200.00/hr	920.00
5/7/01	Continue Tier III Document Index	7.00 75.00/hr	525.00
5/8/01	Review OTR documentation	4.60 200.00/hr	920.00
	Continue Tier III Index	8.80 75.00/hr	660.00
	Review IMDA legislative history materials	1.50 200.00/hr	300.00
5/9/01	Review and Index OTR documents	5.20 200.00/hr	1,040.00
	Review Bi-weekly report	0.20 200.00/hr	40.00
	Continue Tier III Index	7.80 75.00/hr	585.00

	Review documents related to OTR investigation	4.60 200.00/hr	920.00
	Review plaintiffs reply re: Discovery issues	0.70 200.00/hr	140.00
5/10/01	Continue Tier III Index	6.30 75.00/hr	472.50
	Review documents related to OTR invetigation	3.30 200.00/hr	660.00
5/11/01	Review NAPA's Study in Management	2.40 200.00/hr	480.00
	Continue Tier III index	7.40 75.00/hr	555.00
	Research Discovery Issues, claim theory	4.00 200.00/hr	800.00
5/12/01	Review Interior's declaration regarding shredded document at OIRM	0.20 200.00/hr	40.00
	Review Most & Blackwell letters regarding O&G tapes at OIRM, Albuquerque	0.20 200.00/hr	40.00
	Review Brooks letter to Gingold regarding May 2, 2001 meeting concerning OIRM security	0.20 200.00/hr	40.00
	Continue tier III index	8.50 75.00/hr	637.50
5/13/01	Review Treasury Motion to extricate itself from contempt/attachments	4.50 200.00/hr	900.00
5/14/01	Draft IMDA Opinion	5.00 200.00/hr	1,000.00

	Continue Tier III Index	8.70 75.00/hr	652.50
5/15/01	Continue Tier III Index	8.50 75.00/hr	637.50
	Review documents relevant to OTR production; conference with personnel to verify information contained therein	4.50 200.00/hr	900.00
5/16/01	Continue Tier III Index	8.20 75.00/hr	615.00
	Review Article regarding Internet Firewalls	1.50 200.00/hr	300.00
	Review amendments to UNM hantavirus contracts	0.30 200.00/hr	60.00
5/17/01	Review Himmelhoch correspondence regarding IMDA material; Ferrell correspondence concerning destruction of documents at Kansas City Fed and missing boxes at Cleveland Fed	0.10 200.00/hr	20.00
	Review TRO Motion including attachments	4.10 200.00/hr	820.00
	Continue Tier III Index	7.80 75.00/hr	585.00
5/18/01	Draft Report and Recommendation regarding Interior's motion to modify 2/8/01 order; reserach issues relating to due process; ex parte contracts and Ruiz v. Estelle and similar cases	5.00 200.00/hr	1,000.00

	Review Himmelhoch letter regarding Preliminary Assessment findings and Objection to Special Master's Opinion Clarifying Recommendation	0.40 200.00/hr	80.00
	Continue document index	7.10 75.00/hr	532.50
	Review TRO Documents	0.70 75.00/hr	52.50
5/19/01	Review OTR Investigation documents	5.50 200.00/hr	1,100.00
5/20/01	Prepare for upcoming Albuquerque Trip; review documents relating to: OIRM facility; Regional office closure etc.	6.00 200.00/hr	1,200.00
5/21/01	Continue document index	6.80 75.00/hr	510.00
	Review documents in preparation for OIRM conference.	4.40 200.00/hr	880.00
	Interview Moles and conference w/Christie	3.70 200.00/hr	740.00
5/22/01	Continue document index	7.10 75.00/hr	532.50
5/23/01	Review final report & recommendation to modify protective order	0.30 200.00/hr	60.00
	Research discovery issues	2.50 200.00/hr	500.00
5/24/01	Continue Document Index	7.20 75.00/hr	540.00

	Telephone conference with admin. expert from G.W. re non-statutory review issues and discovery	0.50 200.00/hr	100.00
5/25/01	Continue Document Index	8.10 75.00/hr	607.50
	Return from Albuquerque; review documents	4.60 200.00/hr	920.00
5/26/01	Draft outline on discovery dispute and beginning memo	0.80 200.00/hr	160.00
	Review documents from Albuquerque trip and OTR investigation records produced in response to Attachment B	5.50 200.00/hr	1,100.00
	Interview and review supporting documentation from computer security experts	1.50 200.00/hr	300.00
5/29/01	Continue Document Index	8.30 75.00/hr	622.50
	Draft outline on discovery issue	1.90 200.00/hr	380.00
	Review May 22 Bi-Weekly Report and OTR Report	1.50 200.00/hr	300.00
	Review background material related to Predictive Systems; meeting w/Errol Weiss, Engineer	1.30 200.00/hr	260.00
5/30/01	Research Discovery issues and draft outline of report	4.00 200.00/hr	800.00
	Draft Monthly Report	1.50 75.00/hr	112.50

5/31/01	Review Abeita documentation regarding closure of Southwest Regional Facility; draft section for Monthly Report	1.50 200.00/hr	300.00
	Draft & Edit Monthly Report	2.00 200.00/hr	400.00
	Fifteen Percent Discount		(5,613.75)
	For professional services rendered	281.50	$31,811.25
	Additional charges:		
4/26/01	Copying cost		253.49
5/2/01	Courier Services		13.74
5/11/01	Cabfare to GW Library		14.00
5/17/01	Courier Services		22.74
	Courier Services		8.72
5/18/01	Transcript Cost		161.00
5/21/01	Cabfare to ALB Meeting		6.50
5/25/01	Cabfare to GW Library		7.50
	Total costs		$487.69
	Total amount of this bill		$32,298.94
	Balance due		$32,298.94